Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED JUNE 19, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

MICHAEL RODAK, JR., CLERK
NOV 18 1975
FILED
Supreme Court, U. S.

CONTENTS OF APPENDIX

Page

Chronological List Of Relevant Docket Entries A-1

Plaintiffs' Order To Show Cause (April 4, 1974) A-5

Summons (April 4, 1974) A-7

Complaint (April 4, 1974) A-7

Affidavit Of Michael Wisnoski In Support Of Order To Show Cause (April 4, 1974) A-15

Affidavit Of Rose Marie Olson In Support Of Order To Show Cause (April 4, 1974) A-22

Affidavit Of Thomas Nadeau In Support Of Order To Show Cause (April 4, 1974) A-26

Affidavit Of Judy Murphy In Support Of Order To Show Cause (April 4, 1974) A-29

Affidavit Of Russell Lichte In Support Of Order To Show Cause (April 4, 1974) A-32

Affidavit Of Ronald Hammond In Support Of Order To Show Cause (April 4, 1974) A-35

Exhibit List Of Plaintiffs' Exhibits In Hearing Held Before Circuit Court On Plaintiffs' Application For Temporary Injunction A-38

Transcript Of Circuit Court's Decision On Plaintiffs' Application For Temporary Injunction (April 11, 1974) A-119

Circuit Court's Order Denying Application For Temporary Injunction A-127

Defendants' Answer (April 24, 1974) A-128

Circuit Court's Pretrial Order Granting Leave To File Amended Complaint And Extending Time For Summary Judgment Motion (June 3, 1974) A-131

Plaintiffs' Amended Complaint (May 30, 1974) ...A-132

Defendants' Answer To First Cause Of Action In Amended Complaint And Demurrer To Stated Second, Third, and Fourth Causes Of Action (June 20, 1974) A-142
Plaintiffs' Notice Of Motion For Order Overruling Demurrers (June 21, 1974) A-148
Plaintiffs' Motion For Order Overruling Demurrers (June 21, 1974) A-148
Defendants' Notice Of Motion For Summary Judgment (June 12, 1974) A-149
Affidavit Of Roger Weihing In Support Of Motion For Summary Judgment (June 20, 1974) A-150
Affidavit Of Michael Wisnoski In Opposition To Motion For Summary Judgment (June 25, 1974) ... A-167
Circuit Court Decision Granting Motion For Summary Judgment To First Cause Of Action In Amended Complaint (July 19, 1974) A-172
Circuit Court Decision Sustaining Demurrers To Second, Third And Fourth Causes Of Action In Amended Complaint (July 19, 1974) A-203
Circuit Court Order Granting Motion For Summary Judgment On First Cause Of Action (July 26, 1974) A-210
Circuit Court Order Sustaining Demurrers To Second, Third And Fourth Causes Of Action (July 26, 1974) A-211
Judgment Dismissing First Cause Of Action (August 27, 1974) A-212
Notice Of Entry Of Judgment (August 28, 1974) .. A-214
Petition To The Wisconsin Supreme Court For Leave To File An Original Action (September 10, 1974). A 216
Order To Show Cause (September 10, 1974) A-226
Opinion Of Wisconsin Supreme Court (February 5, 1975) A-230

Concurring—Dissenting Opinion Of Mr. Justice Hanley A-260
Concurring Opinion Of Mr. Justice Robert Hansen . A-262
Respondent's Motion For Rehearing (February 21, 1975) A-270
Appellant's Motion For Rehearing (February 22, 1975) A-270
Respondent's Petition For Order To Show Cause And Temporary Restraining Order (February 20, 1975) A-271
Order To Show Cause And Temporary Restraining Order (February 22, 1975) A-274
Respondent's Motion To Vacate Temporary Restraining Order And To Deny Permanent Injunction And Memorandum In Support Of Motion To Vacate Temporary Restraining Order And In Opposition To Order To Show Cause For Permanent Injunction (February 24, 1975) A-275
Affidavit Of Jack Walker In Support Of Motion To Vacate Temporary Restraining Order And Opposing Motion For Permanent Injunction (February 24, 1975) A-279
Order Of Wisconsin Supreme Court Denying Order To Show Cause And Vacating Temporary Restraining Order (February 24, 1975) A-283
Per Curiam Decision Of Wisconsin Supreme Court Denying Motion For Rehearing (March 28, 1975) .. A-284
Respondent's Motion To The Wisconsin Supreme Court For Stay To Permit Application To Supreme Court Of The United States For A Writ Of Certiorari And Memorandum In Support Of Motion (April 16, 1975) A-285
Appellant's Memorandum In Oppisition To Respondent's Request For A Stay (April 16, 1975) A-287

Order Of Wisconsin Supreme Court Granting Motion For Stay And Ordering Such Stay For A Period Of Ninety (90) Days Or Until Further Order Of The Court (April 30, 1975) A-298
Appellant's Motion For Reconsideration Of Stay Order (May 6, 1975) A-299
Order Of Wisconsin Supreme Court Denying Motion For Reconsideration Of Stay Order (May 7, 1975) A-301
Appellant's Motion To Vacate Stay Order (June 7, 1975) A-302
Respondent's Memorandum Opposing Motion To Vacate Stay Order (June 16, 1975) A-303
Affidavit Of Thomas St. John In Support Of Motion To Vacate Order Staying Execution Of Judgment (July 3, 1975) A-305
Order Of Wisconsin Supreme Court Denying Motion To Vacate Stay Order (July 8, 1975) A-306
Respondent's Motion To The Wisconsin Supreme Court For Continuance Of Stay Previously Granted (July 22, 1975) A-307
Appellant's Memorandum In Opposition To Respondent's Motion For Continuance Of Stay (July 29, 1975) A-309
Order Of The Wisconsin Supreme Court Denying Motion For Extension Of Stay (August 1, 1975) ...A-311
Petitioner's Application For Stay Of Mandate Of Wisconsin Supreme Court Pending Review On Certiorari To William H. Rehnquist, Associate Justice, United States Supreme Court And Circuit Justice For The Seventh Circuit (August 8, 1975) A-311
Respondent's Opposition Memorandum To Application For Stay Of Mandate To Mr. Justice Rehnquist (August, 1975) A-320

Decision Of Mr. Justice Rehnquist Denying The Application For Stay Of Mandate (August 18, 1975) ..A-327
Order Of Circuit Court Staying Proceedings Pending Decision Of United States Supreme Court (October 22, 1975) A-328

ERRATA TO APPENDIX INDEX

Page
Exhibits admitted by Circuit Court at hearing on Order To Show Cause April 9, 10, 11, 1974:
Exhibit List 38
Exhibit No. 1 38
Exhibit No. 2 40
Exhibit No. 3 41
Exhibit No. 4 42
Exhibit No. 6 60
Exhibit No. 7 62
Exhibit No. 9 99
Exhibit No. 10 106
Exhibit No. 11 112
Exhibit No. 12 116
Exhibit No. 13 118
Order of Wisconsin Supreme Court denying petition for original action, filed September 24, 1974 227
Notice of Appeal, filed in circuit court, Outagamie County, Wisconsin, October 10, 1974 229
Judgment of Wisconsin Supreme Court reversing the judgment of the circuit court for Outagamie County, filed February 5, 1975 269

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 5, 1974 - Plaintiffs' Order to Show Cause, Summons, Complaint and Affidavits in Support of Order to Show Cause, filed in circuit court, Outagamie County, Wisconsin.

April 9, 10 and 11, 1974 - Hearing held on plaintiffs' application for temporary injunction before the Honorable Allan J. Deehr, Circuit Judge.

April 24, 1974 - Defendants' answer filed.

April 25, 1974 - Circuit court's order denying temporary injunction, filed.

May 31, 1974 - Plaintiffs' amended complaint filed.

June 5, 1974 - Circuit court's pre-trial order filed, granting leave to file amended complaint and extending time for summary judgment motions.

June 20, 1974 - Defendants' answer to first cause of action in amended complaint and demurrer to stated second, third and fourth causes of action, filed.

June 26, 1974 - Plaintiffs' notice of motion and motion for order overruling demurrers, filed.

June 27, 1974 Transcript of circuit court's April 11, 1974 decision from the bench denying temporary injunction, filed.

June 27, 1974 - Defendants' notice of motion and mo-

tion for summary judgment, and affidavit in support of motion for summary judgment, filed.

June 27, 1974 - Plaintiffs' affidavit in opposition to defendants' motion for summary judgment, filed.

July 19, 1974 - Circuit court decision filed, granting motion for summary judgment to first cause of action in amended complaint.

July 19, 1974 - Circuit court decision filed, sustaining demurrers to second, third and fourth causes of action in amended complaint.

July 29, 1974 - Order granting motion for summary judgment and Order sustaining demurrers to second, third and fourth causes of action, filed.

August 27, 1974 - Judgment dismissing first cause of action filed.

September 4, 1974 - Notice of entry of judgment filed.

September 10, 1974 - Order to show cause and petition for leave to commence an original action filed by plaintiffs in the Wisconsin Supreme Court; order to show cause signed by Chief Justice Horace W. Wilkie.

September 24, 1974 - Order entered by Wisconsin Supreme Court denying petition for original action and setting briefing schedule if an appeal is taken from the circuit court's decision.

October 10, 1974 - Notice of appeal filed by plaintiffs in circuit court for Outagamie County, Wisconsin.

November 26, 1974 - Cause argued before the Wisconsin Supreme Court.

February 5, 1975 - Opinion of Wisconsin Supreme Court filed, and judgment of Wisconsin Supreme Court entered reversing the judgment of the circuit court and remanding for further proceedings.

February 21, 1975 - Order to show cause and temporary restraining order and petition therefor filed by plaintiffs in Wisconsin Supreme Court; order to show cause and temporary restraining order signed by Chief Justice Horace W. Wilkie

February 24, 1975 - Motions for rehearing by Appellants and Respondents filed in Wisconsin Supreme Court.

February 24, 1975 - Defendants' motion to vacate temporary restraining order and to deny permanent injunction, and affidavit in support thereof, filed.

February 24, 1975 - Order of Wisconsin Supreme Court filed, denying order to show cause and vacating temporary restraining order.

March 28, 1975 - Per Curiam decision of Wisconsin Supreme Court filed, denying motions for rehearing and revising a sentence in the February 5th opinion of the court.

April 17, 1975 - Respondents' motion for stay to permit application to Supreme Court of the United States for a writ of certiorari, filed in Wisconsin Supreme Court.

April 22, 1975 - Appellants' memorandum opposing request for stay filed.

April 30, 1975 - Order of Wisconsin Supreme Court filed, granting motion for stay and ordering such stay for a period of ninety (90) days or until further order of the court.

May 6, 1975 - Appellants' motion for reconsideration of stay order filed.

May 7, 1975 - Order of Wisconsin Supreme Court filed, denying motion for reconsideration of stay order.

June 9, 1975 - Appellants' motion to vacate stay order filed.

June 16, 1975 - Respondents' memorandum opposing motion to vacate stay order, filed.

June 19, 1975 - Petition for writ of certiorari filed in the United States Supreme Court.

July 7, 1975 - Appellants' affidavit in support of motion to vacate stay order, filed.

July 8, 1975 - Order of Wisconsin Supreme Court filed, denying motion to vacate stay order.

July 23, 1975 - Respondents' motion for continuance of the stay previously granted, filed with Wisconsin Supreme Court.

July 30, 1975 - Entry Omitted.

August 1, 1975 - Order of Wisconsin Supreme Court filed, denying motion for extension of stay.

August —, 1975 - Petitioners' application for stay of mandate of the Wisconsin Supreme Court pending review on certiorari, to William H. Rehnquist, Associate Justice, United States Supreme Court and Circuit Justice for the Seventh Circuit, filed.

August —, 1975 - Respondents' opposition memorandum to application for stay of mandate, to Justice Rehnquist, filed.

August 21, 1975 - Decision of Mr. Justice Rehnquist denying the application for stay of mandate, No. A-133 (74-1606), received by the Wisconsin Supreme Court.

October 6, 1975 Petition for ceriotiorari granted.

October 24, 1975 - Order of circuit court staying proceedings pending decision of United States Supreme Court, filed in Outagamie County Circuit Court.

STATE OF WISCONSIN OUTAGAMIE COUNTY CIRCUIT COURT

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE, and RONALD HAMMOND,

Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH, and RONALD SUPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS, and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Defendants.

ORDER TO SHOW CAUSE

TO: The defendants above-named.

On reading and filing the verified Complaint and the Affidavits of Michael Wisonski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte, and Ronald Hammond, and on the motion of Lawton & Cates, attorneys for the plaintiffs above-named;

IT IS ORDERED that the above-named defendants, and each one of them, show cause before me in the Circuit Court Room of the Outagamie County Court House, at 9:30 A.M., on April 10, 1974, why an injunction should not be granted temporarily restraining the said defendants, their administrators and any and all other of their agents, from hiring any permanent replacements for the plaintiffs, or any other teachers similarly situated, and ordering the defendants to rescind, and render null and void, any and all contracts with such permanent replacements, that might have been entered into, and ordering such other and further relief as is prayed for in the aforesaid Complaint; let a copy of this Order to Show Cause be served on said defendants, together with copies of the Complaint and Affidavits referred to above, not less than before said hearing;

* * *

Dated: April 4, 1974.

BY THE COURT:

/s/ GORDON MYSE
Judge
Outagamie County Circuit Court

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

SUMMONS

THE STATE OF WISCONSIN, TO SAID DEFENDANTS:

You are hereby summoned and required to serve upon Lawton & Cates, plaintiff's attorneys, whose address is 110 East Main Street, Madison, Wisconsin 53703, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service, and in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint.

Dated: April 4, 1974

/s/ BRUCE EHLKE
LAWTON & CATES
Attorneys for Plaintiffs
110 East Main Street
Madison, Wisconsin 53703

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

COMPLAINT

Case No. ——

COME NOW the plaintiffs above-named, by their attorneys, Lawton & Cates, and as and for a cause of action

against the above-named defendants, allege and show to the Court as follows:

1. Plaintiff, Hortonville Education Association (hereinafter "Association"), is a labor organization as defined at Section 111.70 (1) (j), of the Wisconsin Statutes. It is the collective bargaining representative of all teachers employed by the Hortonville Joint School District No. 1. Michael Wisnoski is the President of the Association.

Plaintiff Michael Wisnoski is a public school teacher. He resides with his wife and three (3) children at Route #1, North Road, Appleton, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1, and he has been the President of the Association.

Plaintiff Rose Marie Olson is a public school teacher. She resides with her husband and two (2) children at 509 West Cedar Street, Hortonville, Wisconsin. At all times material hereto, she has been employed as a teacher by the Hortonville Joint School District No. 1.

Plaintiff Thomas Nadeau is a public school teacher. He resides with his wife and children at Roue # 1, Grandview Road, Hortonville, Wisconsin. At all times material hereto, he has been employed as a high school teacher by the Hortonville Joint School District No. 1.

Plaintiff Judy Murphy is a public school teacher. She resides with her children at 728 Chestnut Street, Neenah, Wisconsin. At all times material hereto, she has been employed as a guidance counselor by the Hortonville Joint School District No. 1.

Plaintiff Russel Lichte is a public school teacher. He resides with his wife at 2300 Woodrow Court, Appleton, Wisconsin. At all times material hereto he has been em-

ployed as a high school, junior high school, and elementary school teacher by the Hortonville Joint School District No. 1.

Plaintiff Ronald Hammond is a public school teacher. He resides with his three children at 518 Whitney Street, Kaukauna, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1.

2. The plaintiffs individually named in paragraph 1 of this Complaint are representative of all teachers employed by the District whose employments the Board has acted to terminate. Said plaintiffs represent all other Hortonville teachers so situated, and the issues named in this Complaint are of common interest to all teachers in said class. Said class of teachers is too numerous, and it is impractical, to bring all of them before this Court. The named plaintiffs fairly and fully will represent all of the interests of all other teachers situated similarly to the individually-named plaintiffs.

3. Defendant Hortonville Joint School District No. 1 (hereinafter "District") is a public school district organized under the laws of the State of Wisconsin. The District is a municipal employer as defined at Section 111.70 (1) (2), of the Wisconsin Statutes. It has its offices at 211 East Union Street, Hortonville, Wisconsin. Defendant Board of Education of the District (hereinafter "Board") is a public body charged under Wisconsin law with the management of the District. It has its offices at 211 East Union Street, Hortonville, Wisconsin. The duly-elected and acting President of the Board is Roger Weihing, who resides at Route # 1, Appleton, Wisconsin.

Defendant Marvin Obry is the Superintendent of the District and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin. Defendant Robert Kohls is the Hortonville High School Principal and agent of the Board. He has his office at 246 North Olk Street, Hortonville, Wisconsin. Defendant Eugene Riedl is the Hortonville Junior High School and Elementary Schools Principal and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin.

The remaining individually-named defendants all are members of the Board. Robert Hauk, the Clerk of the Board, resides at 111 East Cedar Street, Hortonville, Wisconsin. Jean Meads resides at Route # 1, Hortonville, Wisconsin. Floyd Meyer resides at Route # 2, Appleton, Wisconsin. Merlin Plamann resides at 4510 North McArthy Road, Appleton, Wisconsin. Victor Schroth resides at Route # 1, Hortonville. Wisconsin. Ronald Suprise resides at Route # 2, Hortonville, Wisconsin.

4. Immediately prior to and during and immediately following the weekend of March 30 and 31, 1974, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. The timing of the said notices denied the plaintiffs and others who received similar notices a fair opportunity to consult with an attorney and to prepare a defense.

5. On Monday, April 1, 1974, the plaintiffs and other teachers appeared before the Board and objected to the

lack of a fair notice of the scheduled hearings, to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments, and requested opportunity to present evidence in their defense, and in mitigation of reasons the Board might consider for termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers also requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney, James Ruhly, who also was the attorney responsible for presenting the charges and evidence against them.

6. By letters dated April 2, 1974, the plaintiffs and, on information and belief, almost all other teachers employed by the District, were notified by the Board that the Board had acted to terminate their employments. By these same letters, the plaintiffs and other teachers were invited individually to re-apply for employment with the district.

7. The Association, which represents the plaintiffs and the other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employments of the plaintiffs and other teachers represented by the Association.

8. On information and belief, it is the intention of the Board and their administrators and agents, to hire permanent replacements for all teachers represented by the As-

sociation, including the plaintiffs, who have been discharged. The Board, and its administrators and agents, already have taken steps to begin recruitment of such permanent replacements and to hire such replacements.

9. There does not exist just cause for the discharge of the plaintiffs and other teachers represented by the Association. Circumstances existed that are a defense or mitigation of any reason the Board may have, or may have had, for the said discharges. The discharge of the plaintiffs, and of the other teachers represented by the Association, was and is in violation of the collective bargaining agreement in force between the Board and the Association, and said discharges are null and void.

10. All of the aforesaid acts by the Board and their administrators and agents have been done under color of law, intentionally and maliciously, in bad faith, by the named defendants acting individually and as part of conspiracy to deny the plaintiffs and other teachers similarly situated their lawful rights. Said acts by the Board and their agents have been done for the purpose of and have resulted in the plaintiffs and other teachers being denied employment with the district, which resulted in substantial injury to their personal and professional reputations, and to their ability to secure employment in their teaching profession, and caused them emotional upset and distress, and have caused them to incur expense. By said actions, the Board and the individually-named defendants have deprived the plaintiffs and other teachers similarly situated of property and liberty. Said actions have denied them individual rights secured under the fourteenth (14th) amendment to the U.S. Constitution, which denied them

substantive and procedural due process of law, and which denied them other legal rights.

11. On April 4, 1974, the plaintiffs and other teachers who were discharged by the Board, filed grievances as provided for under the collective bargaining agreement in force between the Association and the Board. The plaintiffs and others similarly situated are acting with all deliberate speed to make use of all contractual remedies available to them and, if necessary, to appeal for a hearing to the Wisconsin Employment Relations Commission (WERC) concerning their discharge.

12. The plaintiffs and all other teachers similarly situated have been discharged from their public employment without being afforded the fair notice and full and fair hearing required by constitutionally secured due process of law. Said denial by the Board and its agents of a fair pre-discharge hearing, and the Board and its agents recruitment and hiring of permanent replacements have caused and will cause irreparable harm to the plaintiffs and others similarly situated.

WHEREFORE, it is prayed that this Circuit Court enter its order granting judgment for the plaintiffs and others similarly situated:

A. declaring the aforesaid actions of the Board and its agents to be a denial of constitutionally-secured due process of law, and null and void;

B. ordering that the discharge of the plaintiffs and the other teachers represented by the Association be set aside, and declared null and void;

C. enjoining the defendants from recruiting and hiring any permanent replacements for the plaintiffs and others similarly situated, until such time as the plaintiffs and others similarly situated have been afforded a full and fair hearing that meets the requirements of constitutionally-secured due process of law, concerning their discharges;

D. enjoining the defendants to rescind and to revoke any contracts they have made for the permanent replacement of any of the plaintiffs or other teachers similarly situated;

E. ordering the Board to bargain in good faith commencing immediately and continuously until such time as the parties have resolved their labor dispute;

F. and that the Court grant such other and further relief as may be appropriate.

Date: April 4, 1974

LAWTON & CATES
Attorneys for Plaintiffs
By: /s/ BRUCE F. EHLKE

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss
OUTAGAMIE COUNTY

MICHAEL WISNOSKI, being first duly sworn, on oath, deposes and says as follows:

1. Your Affiant, Michael Wisnoski, is by profession a public school teacher. He is thirty-five (35) years of age, and resides with his wife, Donna, and their three (3) minor children at Route # 1, North Road, Appleton, Wisconsin.

2. At all times material hereto, your affiant has been a junior high school science teacher and science department chairman, and elementary science consultant employed by the Hortonville Joint School District No. 1. The present 1973-74 school year is his seventh year of employment by the said school district.

3. In addition to the normal expenses to feed, clothe and otherwise support himself, his wife, and children, your affiant also has mortgage payments to meet and car loan repayments to make. Your affiant is dependent on his salary to support himself and his family and to meet his financial obligations.

4. Since August, 1973, your affiant has been a duly-elected and acting president of the Hortonville Education

Association. During the 1972-73 school year, he was the president-elect of said Association. The Hortonville Education Association represents all teachers employed by the Hortonville Joint School District No. 1, and is the collective bargaining agent for said teachers.

5. The collective bargaining agreement presently in force between the Association and the Hortonville Board of Education provides a grievance procedure which includes an appeal to the Wisconsin Employment Relations Comission (WERC) for a hearing. The said collective bargaining agreement also provides that no teacher will be dismissed from employment without just cause.

6. At about 7:30 o'clock in the evening on Saturday, March 30, 1974, your affiant was served a notice by the Hortonville Board of Education that it had scheduled a hearing, to determine whether or not to discharge him, for Tuesday morning, April 2, 1974, at 9:20. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974. To the best of your affiant's knowledge, all but two of the teachers represented by the Hortonville Education Association received hearing notices similar to the one he received. A copy of the notice he received is attached to this Affidavit as Exhibit A. Only individual teachers were notified of the scheduled Board hearings. The Association was not given any notice by the Board of said hearings involving the employees it represents.

7. On Monday, April 1, 1974, your affiant appeared, together with his attorney, before the Hortonville Board of Education. At that time he objected to the short notice he had been given of the discharge hearing scheduled by the

Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time, he also objected to the Board sitting as the decision-maker in any hearing concerning his discharge, because the Board itself was involved as an adverse party in the very dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider to be a basis for terminating his employment, also was denied by the Board. Both of his objections and his request were dismissed by the Board acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney.

8. On April 3, 1974, your affiant received a letter from the Board of Education, a copy of which is attached to this Affidavit as Exhibit B, which letter notifies him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On that same day your affiant also received, in the mail, a copy of the Board resolution which decreed that all teachers represented by the Hortonville Education Association, except one, were discharged, and that the Board would dishonor the teaching contracts for the 1974-75 school year that it previously had tendered to said teachers. A copy of said Resolution is attached to this Affidavit as Exhibit C. To the best of your affiant's knowledge, all teachers represented by the Association received individual notices of a termination of their employment similar to the one received by your affiant.

9. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1 protesting the

termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement in force between the Board of Education and his Association. To date, most of the teachers represented by the Association who received discharge notices similar to your affiant's, have filed grievances protesting said actions by the Board.

10. On information and belief, the Hortonville Board of Education and their administrators and agents intend to hire a teacher to replace your affiant on a permanent basis. To the knowledge of your affiant, the said Board and their administrators and agents similarly intend to hire permanent replacements for all other teachers represented by the Association whose employments have been terminated. If such a recruitment is permitted, and such hiring is accomplished, your affiant and his family, and all other teachers and families similarly situated will be harmed irreparably. The job market for public school teachers generally is very poor. At this particular time in the school year it virtually is non-existent.

11. This Affidavit is made in support of a motion that the Board of Education and its administrators and agents temporarily be enjoined from hiring any teachers to permanently replace your affiant or any other teachers similarly situated, until such time as a full and fair hearing, which meets the requirements of constitutionally-secured due process of law, may be afforded to them.

Dated this 4 day of April, 1974.

/s/ MICHAEL WISNOSKI
Plaintiff

[Subscription omitted in printing]

[EXHIBIT A, WISNOSKI AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Mr. Michael Wisnoski
Route #1, Box 182E
Appleton, WI 54911

Dear Mr. Wisnoski:

The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for Tuesday, April 2, 1974, at 9:20 o'clock in the forenoon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:

/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT B, WISNOSKI AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
April 2, 1974

Mr. Michael Wisnoski
Route 1, Box 182E
Appleton, WI 54911

Dear Mr. Wisnoski:

Please be advised that the Board of Education met on April 2, 1974, and took the following action:

The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

You breached your individual employment contract;

You engaged in strike activity contrary to Wisconsin law.

The Board further found that these breaches of duty and law constitute good and sufficient cause for the immediate termination of your teaching contract.

Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the

insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply.

FOR THE BOARD OF EDUCATION:

/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT C, WISNOSKI AFFIDAVIT]

RESOLUTION

Resolved, that all teachers, heretofore served with notice of hearing dated March 29, 1974, or who waived such service through legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, are guilty of such conduct and are therefore hereby terminated as employees of this district, effective immediately, except Tonia Stamborski; that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employees; that said notice shall inform such terminated employees that his or her district-paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated

employees that they may apply for vacant positions in the District, and that Tonia Stamborski be sent a letter by the Board President reprimanding her for her participation in the unlawful strike and her breach of her employment contract, with a copy of said notice to be inserted in her personnel file; and that a copy of this resolution be sent to the President of the Hortonville Education Association.

Adopted by the Board of Education
April 2, 1974

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

ROSE MARIE OLSON, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Rose Marie Olson, is by profession a public school teacher. She is thirty-seven (37) years of age, and resides with her husband, James Olson, and their two (2) adopted minor children at 509 West Cedar Street, Hortonville, Wisconsin. Your affiant's husband, James Olson, also is by profession a public school teacher.

2. At all times material hereto, both your affiant and her husband, James Olson, have been public school teachers employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1, as an elementary school teacher, continuously during the past nine (9) school years, which employment has been regular, full-time employment during the present school year and the five (5) school years immediately preceding this present year. The husband of your affiant, James Olson, has been employed as a regular, full-time junior high school teacher by the same Hortonville Joint School District No. 1, during the present school year, and the ten (10) school years preceding this year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support themselves and their children, your affiant and her husband also have two mortgage payments to meet. Your affiant and her husband, James Olson, are wholly dependent on their salaries to support themselves and their children and to meet their financial obligations.

4. At about 8 o'clock in the evening of Friday, March 29, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge her, at 2:30 o'clock in the afternoon of Monday, April 1, 1974. This meeting was scheduled to last for twenty (20) minutes. At the same time, at 8 o'clock in the evening of Friday, March 29, 1974, your affiant's husband was served with a notice by the same Board of Education notifying him that the said Board had scheduled a hearing to determine whether or not to discharge him, for 9:20 in the morning of Monday, April 1, 1974.

Neither your affiant nor her husband had opportunity to consult with any attorney until the morning of April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant and her husband appeared, together with their attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, they objected to the short notice that they had been given of the discharge hearing scheduled by the Board, and of their lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time they also objected to the Board of Education sitting as the decision-maker in any hearing concerning their discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant and her husband to present evidence in their defense and in mitigation of any conduct on their part, that the Board might consider as a basis for terminating their employments, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant and her husband.

6. On April 3, 1974, both your affiant and her husband, James Olson, individually received letters from Board of Education President, Roger Weihing, which letters were notifying each of them individually that the Board had acted to terminate their employments with the Hortonville Joint School District No. 1. On April 4, 1974, both your affiant and her husband, each individually filed a

grievance with the Hortonville Joint School District No. 1, protesting the termination of their employments on the grounds that said terminations of employment were without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire teachers to replace both your affiant and her husband on a regular, full-time and permanent basis. If such a hiring is accomplished, your affiant, her husband, James Olson, and their children irreparably will be harmed. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is nonexistent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant and her husband, or any other teachers similarly situated.

Dated this 4th day of April, 1974.

/s/ ROSE MARIE OLSON
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

THOMAS NADEAU, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Thomas Nadeau, is by profession a public school teacher. He is thirty-six (36) years of age, and resides with his wife, Patricia Nadeau, and their three (3) minor children, at Route # 1, Grandview Road, Hortonville, Wisconsin.

2. At all times material hereto, your affiant, Thomas Nadeau, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a high school biology teacher, continuously during the past seven (7) years, including the present 1973-74 school year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support himself, his wife, and their children, your affiant also has a mortgage payment to meet. Your affiant is dependent on his salary to support himself, his wife, and children and to meet his financial obligations.

4. At about 8 o'clock in the evening of Friday, March 29, 1974, a notice was served by the Board of Education of Hortonville Joint School District No. 1 on the nine-year-old son of your affiant, which notice informed your affiant that the Board had scheduled a hearing, to determine whether or not to discharge him, at 11:20 o'clock in the forenoon of Monday, April 1, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have opportunity to consult with any attorney until the morning of April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared, together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense and in mitigation of any conduct on his part, that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from

the Board of Education President Roger Weihing, which letter notified him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant signed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association. In the same letter your affiant was notified that the Board also would dishonor the teaching contract it had tendered to him for the 1974-75 school year. The present job market for public school teachers, particularly at this time of the school year, virtually is non-existent.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1 and their administrators and agents, intend to hire a teacher to replace your affiant, on a permanent basis. If recruiting for such a hiring is permitted, and if such a permanent hiring is accomplished, your affiant, and his family, will be harmed irreparably.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from permanently hiring any teacher to replace your affiant or any other teacher similarly situated.

Dated this 4 day of April, 1974.

/s/ THOMAS NADEAU
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss.
OUTAGAMIE COUNTY

JUDY MURPHY, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Judy Murphy, is by profession a public school teacher. She is forty-two (42) years of age, and resides with her two minor sons at 728 Chestnut Street, Neenah, Wisconsin. She also has a daughter who is a freshman in college.

2. At all times material hereto, your affiant has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a guidance counselor in the junior and senior high schools, which employment has been regular, full-time employment during the present school year and the two (2) school years immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support herself and her three children, your affiant also has a mortgage payment to meet, as well as the expenses incidental to her daughter's college enrollment. Your affiant is dependent on her salary to support herself and her three (3) children and to meet her financial obligations.

4. At about 10:30 o'clock in the morning of Monday, April 1, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge her, at 10:40 o'clock in the evening of Wednesday, April 2, 1974. Your affiant did not have an opportunity to consult with an attorney until Monday, April 1, 1974.

5. On Monday, morning, April 1, 1974, your affiant appeared, together with her attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time she objected to the short notice that she had been given of the discharge hearing scheduled by the Board and of her lack of opportunity to prepare her defense. This objection was dismissed by the Board. At the same time she also objected to the Board of Education sitting as the decision-maker in any hearing concerning her discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant to present evidence in her defense, and in mitigation of any conduct on her part that the Board might consider as a basis for terminating her employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which letter was notifying her that the Board had acted to

terminate her employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of her employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and her union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire a teacher to replace your affiant on a permanent basis. If such a hiring is accomplished, your affiant and her children irreparably will be harmed. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ JUDY MURPHY
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

RUSSELL LICHTE, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Russel Lichte, is by profession a public school teacher. He is twenty-six (26) years of age, and resides with his wife, Lynn Lichte, at 2300 Woodrow Court, Appleton, Wisconsin.

2. At all times material hereto, your affiant, Russel Lichte, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as an elementary and junior high school physical education teacher and junior high and high school math teacher for two (2) continuous years, which employment has been regular, full-time employment during the present school year and the school year immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe and otherwise support himself and his wife, your affiant also has to pay rent. Your affiant, Russel Lichte, is wholly dependent on his salary to support himself and his wife and to meet their financial obligations.

4. At about 7:45 o'clock in the morning of Saturday, March 30, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge him, at 2:10 o'clock in the afternoon of Tuesday, April 2, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which

letter was notifying him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire teachers to replace your affiant on a regular, full-time and permanent basis. If such a hiring is accomplished, your affiant, Russel Lichte, and his wife, irreparably will be harmed. Among other things, if your affiant must depend on his wife to support him, he and his wife will be unable to have children and to raise a family. The job market for public school teachers at this time, and in particular at this time of the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant and/or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ RUSSEL LICHTE
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss.
OUTAGAMIE COUNTY

RONALD HAMMOND, being first duly sworn, on oath, deposes and says as follows:

1. Your affiant, Ronald Hammond, is by profession a public school teacher. He is thirty-four (34) years of age, a widower, and reides with his three (3) minor children, ages 7, 9, and 11, at 518 Whitney Street, Kaukauna, Wisconsin.

2. At all times material hereto, your affiant, Ronald Hammond, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a junior high school (grades 7 and 8) language arts and social studies teacher, for thirteen (13) continuous years, which employment has been regu'ar, full-time employment during the present school year and the twelve (12) school years immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support himself and his three (3) minor children, your affiant also has to pay a babysitter on a weekly basis because he is a widower, and he also

has car payments to make and other loan re-payments to make. Your affiant, Rona'd Hammond, is wholly dependent on his salary to support himself and his children and to meet his financial obligations.

4. At about 12:00 noon on Monday, April 1, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge him, at 1:50 o'clock in the afternoon of Wednesday, April 3, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have an opportunity to consult with an attorney until Monday, April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared, together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice

of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 4, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which letter was notifying him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, promptly after receiving his letter of termination, the affiant, Ronald Hammond, filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire a teacher to replace your affiant on a permanent basis. If such a hiring is accomplished, your affiant and his three children will be caused irreparable harm. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant, or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ RONALD HAMMOND
Plaintiff

[Subscription omitted in printing]

EXHIBIT LIST
[Caption omitted in printing]
Judge Allen [sic] Deehr
Reporter James Kempfer
Hearing begun 4-9-74

PLAINTIFF'S EXHIBIT

Mkd for Identf	Offered in evid	Rec'd	Ref'd	With drawn	
√	√	√			#1—notice of discharge hearing
√	√	√			#2—letter of 4-2-74
√	√	√			#3—Grievance of Lichte
√	√	√			#4—Collective bargaining Contract
√	√		√		#5—2 page document signed by Mr. Obry
√	√	√			#6—1973-74 Contract
√	√	√			#7—Transcript
√	√	√			#8—Notice with Ctf. of Service
√	√	√			#9—Transcript 4-1-74
√	√	√			#10—Transcript 4-2-74
√	√	√			#11—document with options
√	√	√			#12—minutes
√	√				#13—resolution—Powers

[EXHIBIT # 1, APRIL 9, 1974]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Mr. Russel Lichte
2300 Woodrow Ct Apt. #1
Appleton, Wisconsin 54911

Dear Mr. Lichte:

The Board of Education for the Hortonville Commun-

ity Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for Tuesday, April 2, 1974, at 2:10 o'clock in the afternoon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:
/s/ Roger Weihing
Roger Weihing, President

Served this 30 day of March 1974 A.D.
/s/ Calvin L. Spice
Sheriff

By: /s/ Donald R. Plato
Deputy Sheriff

[EXHIBIT # 2, APRIL 9, 1974]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944

April 2, 1974

Mr. Russel Lichte
2300 Woodrow Ct, Apt. #1
Appleton, WI 54911

Dear Mr. Lichte:

Please be advised that the Board of Education met on April 2, 1974, and took the following action:

The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

You breached your individual employment contract;
You engaged in strike activity contrary to Wisconsin law.

The Board further found that these breaches of duty and law constitute good and sufficient cause for the immediate termination of your teaching contract.

Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply.

FOR THE BOARD OF EDUCATION:
/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT 3, APRIL 9, 1974]

GRIEVANCE

I, the undersigned teacher employed in the Hortonville Community Schools as a member of the Junior High-Elementary School faculty, under Mr. Riedl's supervision, hereby grieve the termination of my employment as noticed to me by Board of Education President Roger Weihing, by his letter to me dated April 2, 1974, on the grounds said action by the Board of Education was without just cause, in violation of the just cause requirement of the collective bargaining agreement in force between the Board and my Association. Remedy: employment.

April 4, 1974.

/s/ Russel E. Lichte

[EXHIBIT 4, APRIL 9, 1974]

Hortonville - 1972-73

PREAMBLE

In order to effectuate the provisions of Section 111.70 of the Wisconsin Statutes to encourage and increase effective and harmonious working relationships between the Board of Education of Hortonville Community Schools, being the Board of Education for Joint School District No. 1, of the Village of Hortonville, Wisconsin, (hereinafter referred to as the "Board"), and its professional employees represented by the Hortonville Education Association, (hereinafter referred to as the "Association"), and to enable the professional employees more fully to participate in and contribute to the development of policies on wages, hours, and conditions of employment.

This agreement is made and entered into on this day of ————, 19——, by and between the Board and the Association.

RECOGNITION

The Board recognizes the Association as the exclusive and sole bargaining representative for classroom teachers, librarians, and guidance counselors—excluding principals, assistant principals, supervisors, and administrators—whether under contract, on leave, employed or to be employed by the Board.

MANAGEMENT RIGHTS

The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and

responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

1. To the executive management and administrative control of the school system and its properties, programs and facilities, and the activities of its employees;
2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and scope of employment, or their dismissal or demotion for just cause, their promotion and their work assignment;
3. To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that, in the opinion of the Board, benefit students;
4. To determine means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aides, class schedules, and hours of instruction.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Con-

stitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States. The Board shall encourage the use of administrative and teacher studies and recommendations in their deliberations and whenever possible consult with the parties affected.

NEGOTIATION PROCEDURE

On or about January 10, 1973, the Board agrees to meet and negotiate in good faith with the duly elected officers and/or committees of the Association on matters relating to wages, hours, and working conditions of employees from the before mentioned bargaining unit.

If an impasse occurs and persists, the parties shall determine whether mediation procedures shall be utilizied. If agreement on this matter is not forthcoming, the procedures of fact finding shall include a request to the Wisconsin Employment Relations Commission to provide the parties with a list of five or seven names from which the parties will select one as the fact finder. Parties initiating mediation or fact finding shall scratch first commissioner, and the scratching of other names will be done by alternating between the Board and the Association.

The Association recognizes the legal obligation of the Board to give to each teacher employed by it a written notice of renewal or refusal to renew his individual contract for the ensuing school year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22 (2) of the Wisconsin Statutes. In the event an agreement concerning wages, hours, and conditions of employment has not been reached by the parties by the date, said individual teacher contracts shall be governed by the terms of the latest Board proposal, and/or until a master agreement is reached.

This agreement may not be modified in whole or in part by the parties except by an agreement between the two parties.

GRIEVANCE PROCEDURE

A. Purpose - The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement at the lowest possible administrative level. A determined effort shall be made to settle any such differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operations during the term of the agreement.

B. Definition - For the purpose of this agreement a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this agreement.

C. Grievances shall be processed in accordance with the following procedures:

Step 1

a. An earnest effort shall first be made to settle the matter informally between the teacher(s) and his immediate supervisor.

b. If the matter is not resolved, the grievance shall be presented in writing by the teacher(s) to the immediate supervisor within five days after the facts upon which the grievance is based first occurred, or first became known. The immediate supervisor shall give his written answer within five days of the time the grievance was presented to him in writing.

Step 2

If not settled in Step 1, the grievance may within five days be appealed to the Superintendent of Schools. The Superintendent shall give a written answer no later than ten days after receipt of the appeal.

Step 3

If not settled in Step 2, the grievance may within ten days be appealed to the Board of Education. The Board shall give a written answer within thirty days after receipt of the appeal.

Step 4

In case of failure to agree in Step 3, the matter in dispute may be submitted on the petition of either party to the Wisconsin Employment Relations Commission to initiate advisory arbitration and to ask the WERC to submit a list of five or seven names from which an arbitrator will be selected. The initiator will scratch the first name and the scratching of other names will be done by alternating between the Board and the Association.

D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the employer fails to give a written answer within the time limits set out for any step, the employee(s) may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

E. The written grievance shall give a clear and concise statement of the alleged grievance including the facts

upon which the grievance is based, the issue involved, the specific section(s) of the agreement alleged to have been violated, and the relief sought.

F. The employees representative may assist in processing the grievance at any step.

G. Saturdays, Sundays, and legal holidays shall be excluded in computing time limits under this article. It is important that grievances be processed as rapidly as possible and the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process.

H. It shall be the option of the aggrieved to meet with the Superintendent or the Board during Step 2 or 3.

I. In the event a grievance is filed so that sufficient time as stipulated under all levels of the procedure cannot be provided before the last day of the school term, should it be necessary to puruse the grievance to all levels of the appeals, then said grievance shall be resolved in the new school term in September under the terms of this agreement and this article, unless mutually agreed upon to continue it during the recessed period.

Policy on Professional Growth

Because knowledge is expanding at a rapid rate and educational innovations exist, the professional growth of the teaching staff must be considered important.

The following policies are designed to promote that professional growth:

1. Those with less than the Bachelor's Degree shall be

required to earn a minimum of eight credits at an accredited degree-granting institution of higher learning every three years, or when it becomes necessary to obtain a teaching license.

2. Teachers with a Bachelor's Degree shall earn a minimum of five credits every five years, dated from September, 1964, or from their starting date of employment, whichever is later. However, if a teacher wishes to qualify for the 4½ year training level, he or she must have 15 semester hours at graduate level.

3. Teachers with a Master's Degree shall earn a minimum of five credits every seven years, dated from September, 1969, or from the date of earning their Master's Degree, or from the starting date of employment, whichever is later. However, if a teacher wishes to qualify for the 5½ year training level, he or she must have 15 semester hours at graduate level in their major teaching field, but not necessarily that they apply toward a doctoral degree.

4. Credits earned in one interval shall not count in another interval.

5. These requirements shall hold until the time interval in which the educator reaches the age of fifty-five.

6. Educators desiring Board credit from other accredited degree-granting institutions must apply for permission from the Board of Education prior to starting the activity. Board credit shall apply toward policy on professional growth, but will not apply to item "e" under Appendix "A".

7. Persons who fail to comply with the regulations will remain at the contract salary under which they are hired following the time interval, until such time that they fulfill the requirements. Placement on the salary schedule after the requirement is fulfilled shall be at the step following the step at which the teacher last met the requirement.

Leave Policies

Sick Leave

a. All teachers of Jt. School District #1 of the Village of Hortonville, et al, shall be entitled to eight (8) days of sick leave per year without deduction of pay upon presentation of evidence of illness by a reputable physician, if such evidence be deemed necessary by the Superintendent.

b. The unused days each year shall be allowed to accumulate up to eighty-five (85) days, and are to be available for qualified extended leave with no deduction of pay for the employee (40.17) (7).

c. Sick leave shall be interpreted to apply to absences because of personal illness or physical incapacity of the employee himself, to absences because of serious illness within the immediate family of the employee, or to absences occasioned by death within the immediate family of the employee. (Immediate family is to be defined as parent, husband or wife, brother or sister, child, grandparent, father-in-law, mother-in-law, aunt, uncle, sister-in-law or brother-in-law.)

d. In making deduction for excused absences not covered by sick leave, the deduction shall be 1/190 of the teacher's contract for each day absent. The deduction shall be made irrespective of whether it is possible to employ a substitute or not.

e. Employees absent under leave provisions and benefits will be fully responsible for the immediate lesson plans, class lists, class books and seating charts. Failure to provide these may be cause for voiding the sick leave benefits.

f. When a teacher is excluded from school because of quarantine and/or non-provoked assault imposed as a result of contract brought about in the line of duty, such teacher will be entitled to full pay without loss of accumulated sick leave.

Emergency Leave

One day of emergency leave may be granted each year, which is not cumulative. Deducted from the day's salary will be the present substitutes pay schedule. Item "e" under sick leave is also in effect. This leave shall be used only in situations of urgency for the purpose of conducting those affairs which are impossible to transact after school hours or during weekends.

Educational Leave

Teachers granted a leave of absence to complete an advanced degree shall be eligible to receive $25.00 per credit up to a maximum of $400.00 to be paid in installments of $200.00 at the end of the first semester of the first two years, upon returning to the school system.

Professional Leave

Instructors may, with the approval of the Superintendent, and concurrence of the Board, attend professional conferences, workshops, institutes and other meetings not scheduled in the school calendar.

The Board shall reimburse instructors for all reasonable expenses incurred: i.e., transporation, lodging, meals, and registration or other fees while on approved professional leave.

When it is evident that attendance or observation of an activity in another school building or school system will contribute to the effectiveness of the instructional program, the Superintendent, with reasonable limitations as to time and number of individuals involved, may grant permission to observe an activity in another school building or school system to instructors without loss of pay.

The Association recognizes and supports a program of surveillance and disciplinary action in any cases involving misuse of leave benefits.

All benefits occurring under these leave policies will automatically expire at the effective resignation date or termination of employment of any employee.

Working Conditions

Experience Allowed

Candidates with teaching experience elsewhere may be hired at full credit or the administrative staff may place the candidate at a lower than actual experience level

with the understanding such candidate shall be on schedule the third contract.

Use of Teachers as Substitutes

An attempt will be made to employ substitute teachers for a 1/2 or full day basis and a study will be conducted to determine the number of times teachers are called upon to substitute for special one hour periods.

Part Time Teacher Policy

Teachers hired for less than full time shall be allowed the experience factor on the salary schedule identical to their actual teaching time the previous year.

Work Day

Regular building hours for teachers shall be eight (8) per day, including a duty free lunch period of at least thirty minutes. The starting and dismissal times which may vary, shall be determined by the District. The above statement to be in effect for the duration of the 1972-1973 contract. It shall then be renegotiated or reverted back to the 1971-1972 contract.

Assignments

Should a change in the teaching assignment from the previous year become necessary for a particular teacher, an attempt will be made to notify the teacher at least 30 days before the fall opening of school.

Various club and class advisors shall be assigned by the administration and these tasks shall be without compensation.

Assistance in Assault Cases

The Board will aid the teacher in situations as provided under Wisconsin Statute 270.58.

Work Load

It is agreed to pay in addition to regular salary, an hourly wage rate equal to 1/1330 of regular salary to any junior or senior high school teacher who has been scheduled an extra class assignment or a teaching work load without a planning period per day on a regular basis.

Dues Check-Off

Payment of Teachers dues and fees to Professional Organizations shall be deducted from teachers salary through a check-off system to be agreed upon.

Professional Obligation

There are certain professional obligations to students, parents, and school which are shared by all teachers, including faculty meetings, conventions, school public relations programs, etc. These obligations are to be met by all teachers without compensation. Failure to meet such professional obligations or to attend conventions will result in loss of pay for days missed.

Instructor Evaluation

All monitoring or observation of the work performance of an instructor shall be conducted openly and with his full knowledge. The use of audio systems, or similar surveillance devices shall be strictly prohibited. Evaluation reports shall be made known to the instructor.

An legitimate complaints regarding an instructor made to the Administration by any parent, student or other person shall be promptly and privately called to such instructor's attention.

Faculty Lounge

The Board shall continue to make available in each school building a room or rooms that are appropriately furnished for use as a faculty lounge containing toilet facilities.

Association Use of School Facilities

The Association shall be allowed to use school facilities for Association business providing such usage does not interfere with the educational program.

Non-Renewal of Contract

A teacher whose contract is not to be renewed for the following school year shall be notified as required by law. The teacher shall be informed of the reasons for his dismissal, in writing, and shall have the right to request a hearing by the Board of Education. Such request must be made in writing within five days after receipt of the notice of dismissal. Teachers whose work is not satisfactory to the administration and Board of Education may not receive an annual increment.

Resignations

Thirty (30) days written notice prior to the effective date of the resignation must be given and mutually accepted by both parties. If the Board is unable to find a satisfactory replacement, no release will be granted. Under

extenuating circumstances, the Superintendent may waive such notice.

A teacher who becomes pregnant shall be required to resign at the end of the fourth month of pregnancy or the beginning of the semester if the periods generally coincide. Depending upon health, doctor certification, and job requirements, the Board may make adjustments to this period based upon the recommendations of the Superintendent.

Retirement

Teachers are to be retired at 65 years of age except that the Board of Education may use their discretion on extension.

Savings Clause

Shall any portion of this contract be invalidated by legislation or court decisions, the remainder the contract will be effective, and the parts affected will coincide with the new law.

School Calendar

The school calendar shall annually be set up by the Board and referred to the Association for its review and recommendation. The calendar shall then be set by the Board of Education.

Salary Schedule and Extra Duty Pay

Appendix "A"

Duration

The provisions of this Agreement will be effective as of the ———— day of ————, 19—, and shall continue and remain in full force and effect as binding on the parties until the ——— day of ———— 19—. This Agreement shall not be extended orally and it is expressly understood that it shall expire on the date indicated.

Education Association	Board of Education
By: ———— President	By: ———— President
By: ———— Secretary	By: ———— Secretary

(APPENDIX "A")

Salary Schedule

1972 - 1973

Teachers working more than the normal school year shall be paid for this extra time at a rate set by the Board of Education. All other salaries shall be based on the schedule except that in cases of emergency the Board may hire above the schedule with the stipulation that the teacher be on schedule in two years.

Following is the basic schedule:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
3	6450	6643+	6837	7224	7611	7998	8385							
4	7350	7570+	7791	8232	8673	9114	9555	9996	10216+	10437	10657+	10878	11098+	11319
4½	7600	7828	8056	8512	8968	9424	9880	10336	10564	10792	11020	11248	11476	11704
5	7850	8085+	8321	8792	9263	9734	10205	10676	10911+	11147	11382+	11618	11853+	12089
5½	8100	8343	8586	9072	9558	10044	10530	11016	11259	11502	11745	11988	12231	12474

The following shall be added to the above basic schedule:

Head Basketball Coach . . .	$600.00	Musical (split-drama and choral).	$100.00
Assistant Basketball Coach.	333.00	One Act Plays	67.00
Head Football Coach	600.00	Senior Class Play	67.00
Assistant Football Coach. .	333.00	Outside Band Activities	266.00
Head Baseball Coach	333.00	Forensics Head Coach.	133.00
Head Wrestling Coach . . .	600.00	Forensics Assistant Coach	100.00
Assistant Wrestling Coach .	333.00	Annual.	200.00
Head Track Coach.	333.00	Assistant Annual Director	100.00
Assistant Track Coach . . .	200.00	Newspaper	200.00
Head Cross Country Coach. .	333.00	High School G.A.A.	350.00
Junior High Coaches	266.00	Jr. High School G.A.A.	67.00
Department Head and Multi-			
Unit Leader -- 1st year	150.00	Teachers employed for periods longer than	
-- 2nd year	225.00	the regular school year shall be paid at	
-- 3rd year	300.00	a rate of $135.00 per week.	

+ means 50¢

Miscellaneous Schedule

a. The Board of Education will pay 80% of major medical insurance plan of Wisconsin Physicians Service with a $40.00 per day hospital room, oral surgery, and ambulance service.

b. Necessary travel in connection with any teaching position shall be reimbursed at the rate of ten cents (10¢) per mile upon a detailed itemized statement submitted by the teacher and approved by the administration.

c. Salaries will be paid in twenty-four (24) installments on the fifteenth (15th) and thirtieth (30th) of each month during the school year and once each month during June, July and August.

d. An increase of salary due to obtaining the bachelor's or master's degree or any step before, between, or after, shall take place at the beginning of the next fall term (September). The teacher shall advance one step from their present experience level.

e. Reimbursement of credits earned will be paid at a rate of $35.00 per credit to a maximum of $175.00 every five years for B.S. degree teachers and every seven years for M.S. degree teachers.

f. Board shall pay the following to the State Teachers Retirement Fund:

$125.00 - Those teachers on the 14th step or below.
$250.00 - Those teachers above the 14th step.

g. All teachers will be expected to perform five (5) extra duties without pay as part of their regular salary. Any duties beyond five for the year will be paid for according to the schedule below.

Extra Duty Pay Schedule as follows:

All supervisors at basketball and wrestling events	$10.00
All bus chaperones	$10.00
Chaperones at dances following another event	$ 5.00
Chaperones at dances not following another event	$10 00
Football ticket sellers, downbox man, football PA announcer, timers at football, basketball and wrestling, scorer at basketball and wrestling, statistician at football games and all chaperones for plays, musicals, concerts, etc.	$ 7.50
Individuals helping at track meets	$ 5.00
Scouting in a sport other than the sport the man is coaching. (Limit: Football-6, Basketball-12)	$10.00

All 7th through 12th teachers will be assigned athletic meet responsibilities. Other activities assignments at Jr. & Sr. High levels will be made at Jr. and Senior High levels respectively.

h. All duties performed on NON-SCHOOL days shall be paid at the rate of $2.25 per hour in addition to the above schedule.

[EXHIBIT # 6, APRIL 9, 1974]

BOARD OF EDUCATION
Joint School Ditrict #1, Village of Hortonville, et al.
Hortonville, Wisconsin

CONTRACT

On the 12th day of March, 1973, the Board of Education of Joint School District No. 1, hereinafter designated School Board, of the Village of Hortonville, et. al., State of Wisconsin, by resolution, hereby contracts with Thomas Nadeau, hereinafter designated Teacher, a professionally trained educator legally qualified in the State of Wisconsin.

The terms of said contract will commence on or about the ———— day of ————, 19—, which includes 190 contract days, of which 180 are teaching days.

For such services rendered, the said School Board is to pay to said Teacher the sum of $11,382.50 in 24 installments, payable on the 15th and 30th day of each month.

It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. This contract is also subject to all policies, rules or regulations of said School Board now existing not inconsistent or in conflict with said collective bargaining agreement.

The parties understand and agree that this is a solemn, binding contract not to be breached by either party without good and sufficient grounds. The contract may be ter-

minated before the end of the term by mutual agreement of both parties.

This contract is not valid unless returned on or before April 15, 1973.

Dated this 12th day of March, 1973.

Hortonville, Wisconsin
BOARD OF EDUCATION
BY:
/s/ Roger Weihing
/s/ Robert Hauk
/s/ Merlin Plamann
/s/ Victor Schroth
/s/ Ronald C. Suprise
/s/ Floyd Meyer
/s/ Sherman J. Waite

I hereby accept the provisions as set forth in this contract:

/s/ Thomas E. Nadeau
R # 1
Hortonville, Wis.

By signing this contract, I attest that I am not under contract to any other school district.

————

[EXHIBIT # 7, APRIL 1974]

HEARING re: Striking Teachers, held before the Hortonville School Board, Monday, April 1, 1974, at 9:00 o'clock a.m.

APPEARANCES: LATHROP & BRAITHWAITE,
148 E. Main Street,
Hortonville, Wisconsin
By James Ruhly, appearing for the School Board

DONALD DICKINSON, Organizational Specialist,
2601 West College Avenue,
Appleton, Wisconsin,
representative of Wisconsin Educational Association Council,
222 West Washington Avenue,
Madison, Wisconsin 53703
by Bruce F. Ehlke, Esq.,
Lawton & Cates,
110 East Main Street,
Madison, Wisconsin 53703

Members of School Board:

Roger Weihing, President
Robert Hauk, Clerk
Floyd Meyer, Vice-President
Jean Meads, Board Member
Merlin Plamann, Treasurer
Victor Schroth, Board Member
Ronald Suprise, Board Member.

MR. WEIHING: Counsel, will you proceed.

MR. RUHLY: The Board of Education has asked me to read the following rules governing the conduct of todays proceedings:

1. Smoking of any sort is prohibited in the building.
2. Silence is requested unless request to speak is granted.
3. No picture-taking is permitted in this meeting room.
4. Only the door furthest from where the members are situated will be used, except in case of emergency, when this door will be available.
5. The lavatory nearest this room is available for our use. The Ladies room is out here, and the Mens room is in the main office.
6. Persons not respecting these rules will be expected to leave the premises immediately.

Is John Amburgy present?

MR. DONALD DICKINSON: I am Don Dickinson. Mr. Amburgy is to be represented by Mr. Bruce F. Ehlke, who has not yet arrived.

MR. RUHLY: Mr. Dickinson, do you know when Mr. Ehlke will be arriving?

MR. DICKINSON: No, not exactly. I expect him at any time.

MR. RUHLY: Before proceeding, we requested Mr. Amburgy who represents the Board as their private attorney, to appear.

MR. DICKINSON: I am waiting for Mr. Ehlke to appear.

MR. RUHLY: Was Mr. Ehlke aware of the hearing beginning at 9:00 o'clock, Mr. Dickinson?

MR. DICKINSON: Did you have conversation with Mr. Ehlke previously?

MR. RUHLY: I am asking you.

MR. DICKINSON: I don't know.

MR. RUHLY: Ladies and Gentlemen of the Board, I am going to suggest that we continue this hearing for nine minutes, in the hopes Mr. Ehlke will at that time be present.

Mr. President, do you wish to take a vote, or will we adjourn the hearing until 9:15?

MR. WEIHING: At this time we will adjourn the hearing to 9:15.

9:16 a.m. - MR. RUHLE: I would like the record to reflect at this point, all of the Board Members are present. Also present is MARVIN OBRY, Superintendent.

Mr. Dickinson, do you know where Mr. Ehlke is staying, so we can call him?

MR. DICKINSON: We have just sent someone out to call him.

MR. RUHLE: Is JAMES OLSON present? Do you represent Mr. Olson?

MR. DICKINSON: Yes.

MR. RUHLE: Does the same position stand with respect to Mr. Olson?

MR. DICKINSON: Yes.

MR. RUHLE: Let the record show it is 9:18, that Mr. Beryl Watson informs me he just spoke with Mr. Ehlke who is just leaving Appleton at this time.

Mr. President, this puts us in a difficult position with scheduling. However, I think it important that individuals involved have representatives of their choosing.

The only further question I have at this point, before I make recommendation to the Board, is that I would like Mr. Amburgy to indicate for the record whether the request made of Mr. Dickinson is as representative on his behalf.

MR. DICKINSON: Mr. Amburgy will answer through counsel.

MR. RUHLE: Mr. Amburgy refuses at this point to respond to my question?

MR. DICKINSON: Mr. Amburgy has empowered me, in the absence of Mr. Ehlke, to speak to and for him, and the teacher will wait until his counsel is available.

MR. RUHLE: Does that hold true for Mr. Olson also?

MR. DICKINSON: It does.

MR. RUHLE: Mr. President, in view of the report with respect to Mr. Ehlke just leaving Appleton, and in view of the fact it is approximately a fifteen-minute drive from Appleton, I would recommend that the Board further adjourn this hearing until 9:35 a.m., while we await Mr. Ehlke's arrival.

MR. WEIHING: Is there any objection from the Board members? (none) We will adjorn this hearing until 9:45 a.m.

MR. RUHLE: Mr. President, it is 9:35. Can the record show whether Mr. Ehlke has appeared yet? Mr. Dickinson, is Mr. Ehlke here?

MR. DICKINSON: No, he is not.

MR. RUHLE: Mr. President, it is 9:40. Is Mr. Russell Hildebrand here? (Yes).

Does Mr. Dickinson represent Mr. Hildebrand?

MR. DICKINSON: Yes, I do.

MR. RUHLE: Would Mr. Hildebrand like to proceed?

MR. DICKINSON: Mr. Hildebrand will await counsel.

MR. RUHLE: The same position as previously stated?

MR. DICKINSON: Yes.

MR. RUHLE: Mr. President, I would ask that the record reflects it is 9:45 a.m., and we are still waiting for Mr. Ehlke.

Let the record show it is 9:46½ a.m., and Mr. Ehlke has just arrived.

Mr. Ehlke, we would like to proceed, if we may.

MR. EHLKE: One problem I have, as I explained to Mr. Dickinson, the shortness of time between the Notice of these hearings which you have scheduled for this morning, have placed somewhat of a burden on me, in order to be able to talk to these people.

MR. RUHLE: May I proceed?

MR. EHLKE: What are we proceeding on?

MR. RUHLE: I would like the record to reflect procedural matters.

MR. EHLKE: Then I would like to speak to Mr. Amburgy. He has contacted me by letter and I haven't even had a chance to speak to him. Are you going to deny me that?

MR. RUHLE: I will permit you to make any statement you wish. You have to'd us Mr. Amburgy has written you asking you to represent him?

MR. EHLKE: I would like to have a chance to speak to Mr. Amburgy.

MR. RUHLE: Are you prepared to advise us whether Mr. Amburgy wants a hearing?

MR. EHLKE: I don't know.

MR. RUHLE: You aren't prepared to let us know that?

MR. EHLKE: I don't know, I haven't talked to the man.

MR. RUHLE: Would you speak to the man with the question whether he wishes a public or private hearing? We have held the meeting up for approximately 45 minutes, and we would like to be advised how you wish to proceed.

MR. EHLKE: As I told you on the phone yesterday, this matter has been going on for two weeks, and I don't take it lightly at all that these people should be served with a Notice two days ago. I would like to talk to Mr. Amburgy.

MR. RUHLE: All right. It's 9:50 and Mr. Ehlke is going to speak to his client.

MR. EHLKE: I would like to speak with a number of people. We could retire from this room.

MR. RUHLE: Whatever you are requesting. If you would like to have five minutes or more, we would leave the room, if it would be more convenient for you.

MR. EHLKE: It would be more convenient for me.

MR. RUHLE: I understand you will address the questions to a public nature and you can address yourself to us. We will be checking back in at 10:00 o'clock, Mr. Ehlke.

(10:10 o'clock am.)

MR. RUHLE: Miss Reporter, will you note that it is now 10:07 and we have returned to the room. Mr. Ehlke, I read an opening sentence earlier, in your absence. I would like to re-read that into the record.

"The purpose of this hearing is to ascertain the relevant facts regarding recent alleged conduct by ————. Before proceeding, we request that counsel please advise the Board if a private hearing is requested in this matter."

Are you prepared to report to that, Mr. Ehlke?

MR. EHLKE: Yes. On behalf of Mr. Amburgy and all the teachers in this room, they have received a Notice which says that the Board of Education has been informed by Superintendent Obry, that since March 18th of 1974, you have breached your employment contract and engaged in unlawful strike. Each person got the same notice, except some of them had white backing and some had blue backing. Now there are other teachers outside that did not receive a notice of such a hearing. As far as all the teachers who received notice of the hearing goes, they want to have an open meeting. That includes Mr. Amburgy, of course. Furthermore, inasmuch as everybody has been charged with the same thing, this meeting should apply to all of them, not just Mr. Amburgy.

MR. RUHLE: We are concerned as I said, at this time, with Mr. Amburgy, and it is true that identical notices with this specific data as to time of hearing, were sent to most of the teachers in the District.

Now with respect to Mr. Amburgy, I would like the record to reflect that in answer to the statement made by me earlier, Mr. Amburgy is not requesting a private hearing. Specifically this hearing is concerned with whether Mr. Amburgy breached his individual employment contract, engaged in unlawful strike contrary to Wisconsin law. Mr. Amburgy was advised of this hearing and the allegations in a notice signed by Board President Weihing at the Board's direction on March 29, 1974, and served on March 29th, 1974 as shown by Proof of Service.

After the Board has had the evidence relevant to the allegations, the Board will determine whether Mr. Amburgy is guilty of the alleged conduct. If the Board finds he is guilty, it will consider what discipline, if any, is appropriate under the circumstances.

The Board has requested me to conduct this hearing and elicit evidence relevant to the allegations enumerated. My name is James Ruhly.

Would Mr. Amburgy or his counsel please state the appearances on Mr. Amburgy's behalf at this time?

Mr. Ehlke, I understand your previous position. I would like the record to reflect who is appearing at this time for Mr. Amburgy.

MR. EHLKE: My name is Bruce F. Ehlke, of the firm of Lawton & Cates, and I am representing all individual teachers in this room who are appearing pursuant to this Notice from the Board of Education which is dated March 29th.

At this time I feel it is only fair that I advise the Board what I advised Mr. Ruhle of yesterday. That is, if you are going to hold hearings on discharge, it has to be a hearing that meets constitutionary due process of law. That means an individual or individuals on the line have to be given fair notice of the charges against them and fair chances also to defend themselves against those charges, and that means opportunity to contact a lawyer if that is appropriate under the circumstances. And it is, in this case, because Mr. Ruhle is sitting there for the Board, he is acting as the Board's spokesman. You have to give them a fair chance to prepare their defense and furthermore, the individual or individuals have the right that they only be tried before a Judge or Tribunal that is fair and impar-

tial in the situation at hand. It certainly, I don't think, can be held that the Board of Education is appearing as an impartial tribunal when you consider what we are talking about—a labor dispute and the Board is employer, and you are talking of punishing folks because of this dispute.

Second, we want a fair and impartial tribunal.

I do understand correctly, Mr. Ruhle, do I not, that you are hired and retained by the Board of Education in this matter?

MR. RUHLE: Correct.

MR. EHLKE: And I understand Mr. Braithwaite is also present in the room today?

MR. RUHLE: Correct.

MR. EHLKE: Who also was hired and retained by the Board of Education?

MR. RUHLE: Correct.

MR. WEIHING: I am asking the men with cameras to leave the room. If they wish to come back in without cameras, they can do so.

MR. EHLKE: I guess what I'm telling you is that we have a very serious problem to the Boards proceeding in this matter under the circumstances here. I have a couple other questions too. Assuming that if we are just here to sit and talk and not sitting here to judge anybody which would be the other alternative—have the proper notices gone out. Is this properly called the School Board meeting?

MR. WEIHING: We are here not to just talk, we are here to consider the matters set forth on the notices served on the teachers.

MR. EHLKE: I would like an answer to my question.

MR. RUHLE: I am not giving you an answer to the question.

MR. EHLKE: Then we have a question of whether you are sitting as Judge here, or having a meeting with you?

MR. WEIHING: We are conducting a hearing to determine the answers to the questions.

MR. EHLKE: Mr. Ruhle gave me a tentative answer and that is, these notices prior to their being sent out to individual employees, was this noticed to the Union or is this a unilateral notice to employees represented by the Union?

Mr. Wisniewski, you are President of the Union?

MR. WISNIEWSKI: Yes.

MR. EHLKE: Did the Board give you notification of this matter?

MR. WISNIEWSKI: None whatsoever.

MR. EHLKE: What were the means by which you learned of this action against the employees, individuals you represent?

MR. WISNIEWSKI: Some of the teachers bringing in letters.

MR. EHLKE: So you got notice through the individuals?

MR. WISNIEWSKI: Right.

MR. EHLKE: I don't know what you folks are trying to do here, but it seems to me that you have to know and understand that you are in a labor relations setting; that your obligation in that setting is to deal with the representatives of the employees and to at least keep that representative advised of actions you might take against individuals represented by this organization. Furthermore, it seems to me you have scheduled three days of so-called hearings in a matter concerning your present labor dispute with the organization and the employees it represents,

and you have done this at a time, as I understand it, when you find it difficult to sit down and bargain with the Union and settle your dispute. In every one of this kind of dispute I have been involved in, whether it be city employees in Superior, Tennessee or Kentucky, wherever, the only place you are going to settle this with your employees is to meet at the bargain table, and a meeting like this is a waste of time and you will not reach agreement under that kind of action. There are problems. Somehow you are going to accomplish your initiative even by permitting people to parade out in front. There is serious question of the lawfulness of the Board sitting at this time, in arriving at this labor dispute. These are questions that are raised because the Constitution of the United States tells us that a man is going to lose his job—and that's what I understand you are talking about—these notices. He is entitled to a hearing before a neutral body, and we certainly don't have that here, because these are your employees and your dispute concerns a difference between the two of you. It's sort of like asking me to sit as a Judge in a dispute between myself and my former wife—and I'll tell you that was a simpler matter and resolved in a simpler manner than this thing.

We also have a problem that the Board didn't even notify the Union of this action. So what's wrong with sitting down and bargaining? That's where you're going to settle the dispute. You can be as angry as all get out and have all kinds of principles about work action that is involved here, but that isn't going to solve your differences.

Now if you insist on having a hearing today, and you think that's somehow going to accomplish something, all right, but it's going to be a hearing that all of these people are tried as a group.

May I have a ruling, Mr. Speaker?

MR. RUHLE: I am not speaking.

MR. EHLKE: Incidentally, when were you retained?

MR. RUHLE: Friday.

MR. EHLKE: And suddenly we have to have a hearing on Monday?

MR. RUHLE: Mr. Ehlke, the procedures utilized by the Board are not the issue here. You have stated your objections, you will have your opportunity to argue on them. The Board at this time is not going to make judgment on the questions you have raised, unless you have something specific you want to ask us with reference to the proceeding here.

MR. EHLKE: I am asking you to respond right now in relation to what I said.

MR. RUHLE: What are you asking us to do?

MR. EHLKE: Meet and bargain.

MR. RUHLE: This hearing wasn't designed for the purpose of considering that question. Let me ask you this. You have had opportunity to speak with your clients?

MR. EHLKE: This meeting can be whatever you want it to be.

MR. RUHLE: And the board has set this meeting to hear, to determine whether certain allegations are true. That's the purpose of the meeting, sir.

MR. EHLKE: That's the alleged purpose of the meeting, and that's what you said. What I bring before you is a fact, the only way to solve these peoples' dispute is to meet and bargain. And I put that on the table.

MR. RUHLE: After that, the Board will consider that. You have indicated you have not had specific time to prepare. Will you make that more specific?

MR. EHLKE: Why are some people here this morning with white and blue backed notices, and others have not?

MR. RUHLE: Mr. Ehlke, if you have objection to the way the Board has served notices, you are free to so state.

MR. EHLKE: It is your contention to serve one of these things on each individual employee of the district?

MR. RUHLE: That is not true.

MR. EHLKE: There are some that aren't going to be here?

MR. RUHLE: That's right.

MR. EHLKE: And what are the reasons?

MR. RUHLE: That, it seems to me, isn't the present issue. I am not going to digress this meeting to examination of what the Board has done. The teachers have all struck in vio'ation of hours and violation of their employment contract. We would like to have whatever is relevant to that.

MR. EHLKE: And I suggest we meet and bargain.

MR. RUHLE: The parties are in mediation but we aren't going to abandon the hearings because you have made another suggestion. Are you preparing to meet with Mr. Amburgy.

MR. EHLKE: Are any other meetings scheduled?

MR. RUHLE: There are none scheduled. That isn't the issue, Mr. Ehlke. Are you prepared to proceed with Mr. Amburgy?

MR. EHLKE: We can't bargain because there is mediation pending.

MR. RUHLE: Mr. Ehlke, are you prepared to proceed with Mr. Amburgy, Mr. Olson and Mr. Hildebrand?

MR. EHLKE: And all the other teachers?

MR. RUHLE: I would want to discuss with the Board

the implications of proceeding on the basis of all teachers that have thus far been served, in one hearing. I am not prepared to tell you whether we can proceed on that basis. I would also like to speak with you prior to making a decision on that.

MR. EHLKE: Well, it seems to me, Jim, it's your meeting. You will have to make the decision what you will want to do with your time. Do you want us to step out while you talk to the Board?

MR. RUHLE: No, that won't be necessary. We will step out if you need to caucus, Mr. Ehlke. Let me ask you again, are you prepared to proceed with Mr. Amburgy—having a hearing with Mr. Amburgy?

MR. EHLKE: First, we aren't going to have a hearing with just Mr. Amburgy. Second, I'm as prepared relative to Mr. Amburgy as other people who have received one of these things.

MR. RUHLE: These 'things', indicating Notices.

MR. EHLKE: The third thing is, it is your meeting, Jim, and I'm not sure exactly if the Boards' position is where it won't bargain, but wants to spend three days in some kind of proceeding which is meaningless as far as settling the dispute. I don't know what your intentions are on how you would proceed, so to that extent I don't know what kind of preparation would be required. I just would have to see what your contentions are before I could really answer you, give you a realistic answer as to what further preparation we might need. We have some preparation, and it is our position that in part the present work dispute is just between management people and the Board of Education are employers—it is resolved of conduct on the part of management and that would become a matter

of issue and we would put in evidence in that regard. Other than that, you will have to tell us what your thoughts are and what you want to do.

May I have a few minutes, Mr. Chairman?

MR. WEIHING: Sure.

MR. EHLKE: As I said before, Jim, everybody is here now. You have the full Board for the first time in weeks, at least meeting with all these people and employees. The problem is the Collective Bargaining Agreement, and that's where some agreement has to be reached. What's wrong with bargaining right now?

We have our lawyer here, we're just wasting time. Can't you get back to the table? You have parents here and kids throughout the whole place.

You bargain for three days and you're going to have an agreement. You screw around with this for three days and you'll have nothing. Can't we get this thing settled?

MR. RUHLE: Is Mr. Ambургy here? If so, I would like to ask him a few questions.

MR. EHLKE: This is a labor dispute, Mr. Ruhle, and you should know you are putting yourself in a position, and this is what I was kind of afraid of—you're going to call individual employees and interrogate them as to their position and that is unlawful. I am going to instruct all my clients to refuse to answer any questions posed by you in this matter. If you have any questions, you ask the Union, not the individuals. It's clear you are trying to circumvent when you start to ask individuals. If you have any questions, pose them to the Union.

MR. RUHLE: Mr. Ehlke, I have a limited number of questions I would like to ask Mr. Ambургy.

MR. EHLKE: I am sure you do.

MR. RUHLE: And I would request that Mr. Ambургy be permitted to answer those questions.

MR. EHLKE: No.

MR. RUHLE: Does the same hold true of Mr. Olson—please don't interrupt me. I have, I think, attempted not to interrupt you, and I will appreciate your not interrupting me. Is Mr. Olson prepared to answer questions I would like to ask him?

MR. EHLKE: Mr. Ruhle, you by-passed the Union when you noticed this matter: you refused to meet and bargain with them, and now you are planning to ask each individual employee questions regarding this major dispute? You should know better than that, Mr. Ruhle.

MR. RUHLE: Mr. Ehlke, you aren't refusing to meet and bargain. It would appear to me you are advising your clients not to answer.

MR. EHLKE: Because it's unlawful for counsel for the employer to interrogate and question employees regarding a labor dispute.

MR. RUHLE: Counsel's categorization of the questions I wish to ask is not accurate. Let the record further note, Mr. Ehlke, that you have available forum in which to present any claims you want to present with respect to whether what the board is doing is lawful or unlawful.

MR. EHLKE: That won't dissolve the dispute that is dividing these people right now. The way to dissolve the dispute right now is to bargain.

MR. RUHLE: Is Mr. Hildebrand here?

MR. EHLKE: Yes.

MR. RUHLE: I would like the record to show who is here and who might not be. Is Mr. Jeffers here?

MR. EHLKE: Yes.

MR. RUHLE: Is Mr. Hildebrand prepared to answer questions?

MR. EHLKE: This answer is the same, because it is highly improper and unlawful for you to interrogate employees.

MR. RUHLE: I appreciate your stating it for the nineteenth time.

MR. EHLKE: I told you you are going to get the same answer in each case.

MR. RUHLE: They will not answer the questions the Board would like to ask—is that your position?

MR. EHLKE: No, because it is improper, Mr. Ruhle. This is a dispute.

MR. RUHLE: Mr. Jeffers' hearing was set for 10:00; Mr. Johnson's for 10:20. Is Mr. Johnson present?

MR. EHLKE: Yes.

MR. RUHLE: And Mr. Kreul's hearing was set for 10:40. Is Mr. Kruel present?

MR. EHLKE: Yes.

MR. RUHLE: I take it that counsel is directing those employees not to answer questions that I might want to ask them, going to the purpose of this hearing?

MR. EHLKE: Yes, for the same reasons I have already given you—harrassment and interrogation is unlawful.

MR. RUHLE: Mr. Ehler, I want the record to reflect the Board strongly disagrees that the questions, or the purpose for the questions we intend to ask, or the purpose of this hearing, are unlawful. I think you should be advised of that. Mr. Ehlke, perhaps—

MR. EHLKE. There is no sense in litigating the question of interference, coercion of employees acting collectively. I don't understand. Mr. Ruhle, what you have against bargaining.

MR. RUHLE: We have nothing against bargaining. This Board has never refused to bargain and it does not so refuse now. But we aren't prepared to bargain because we have other matters scheduled.

MR. EHLKE: Would you like to take another break? As I understand, Mr. Ruhle, you are not only acting as counsel in this case, but do I understand your firm also represents bargaining?

MR. RUHLE: I have not been retained to bargain.

MR. EHLKE: The Chief spokesman for the Board then, is Mr. Weihing?

MR. RUHLE: The chief spokesman for the Board is Mr. Brown and is including Mr. Braithwaite. We are not going to adjourn this meeting for the purpose of negotiation. We have schedules here. We would like to know if your people are going to cooperate in these hearings.

MR. EHLER: What is the purpose of hearings?

MR. RUHLE: The notice was served on each teacher, it could not be more succinctly stated. We have three more people scheduled for hearings this morning.

MR. EHLKE: Who are they?

MR. RUHLE: Miss Rosemarie Lauer. Is she present?

MR. EHLKE: Yes, she is.

MR. RUHLE: Would Miss Lauer like to proceed with her hearing at this time?

MR. EHLKE: The answer is going to be the same in every case, Jim.

MR. RUHLE: Can we call her matter at 10:47?

MR. EHLKE: You are pushing us on the time now. You gave us 20 minutes to defend our livelihood, and now you're going to take away even that.

MR. RUHLE: Mr. Ehlke, we are here today to see what

the teachers have to say about the allegations that have been made. You don't need to deprive them of that opportunity. Counsel has asked them not to make statements.

MR. EHLKE: Are we here to settle a labor dispute or are we here to intimidate? What are we here for?

MR. RUHLE: To ascertain whether certain allegations are true. It has a responsibility in that area to all employees. It is in the pursuit of known reports this morning.

MR. EHLKE: Wouldn't it be right to say given the time, the opportunity, is to settle this dispute and get the people back to work?

MR. RUHLE: The Board did not go on strike. The Board did not cause closing of school for several weeks. We are here to see who did go on strike.

MR. EHLKE: If you know who did, why are you asking us?

MR. RUHLE: I would like each teacher to tell us whether they have a statement to make to the Board before the Board determines what disciplinary action, if any, is appropriate.

MR. EHLKE: Is that going to settle the dispute? Is that going to unchain the school doors—put the people back to work?

MR. RUHLE: Mr. President, Miss Lauer did not answer, or counsel did not consent to calling her matter prior to 11:00 o'clock. Therefore I would suggest that we wait and call that matter at 11:00 o'clock.

MR. EHLKE: And I would suggest that the Board consider bargaining. Because of this thing this morning, the Board has two lawyers present, the Union and people it represents individually and as an organization, has a lawyer present.

MR. RUHLE: Are we on the record? I think we should be off the record until 11:00 o'clock.

* * *

MR. RUHLE: Back on the record. Mr. Ehlke and I have had the ten-minute discussion off-the-record, and Mr. Ehlke is going to discuss with his clients that are present, the manner in which they wish to proceed, the question being raised because it is possible that his clients will on-the-record stipulate—at least those that have been served—that they received some advice from their counsel, which advice they do accept, and that it will not be necessary for the Board to call hearings at 11:00, 11:20, 11:40, and on into the afternoon and evening. Mr. Ehlke has a list of employees involved. I don't have a list, Bruce. I have copies of the notices. Any of your clients that have hearing for Tuesday and Wednesday, if they wish to handle it that way, state it on the record. If there are any who do not wish to handle it that way, we can handle it tomorrow and Wednesday.

MR. EHLKE: O.K. We believe it can be better handled by reaching an agreement.

(Adjournment: 11:00 a.m., to 11:53 a.m.)

CHAIRMAN OF THE BOARD: Let the record show we are back in session at 11:53, and that I requested camera men to also stop their cameras at this time.

MR. RUHLE: Were you both present during the time the rules of these proceedings were read?

MR. EHLKE: I wasn't present at the time the proceedings were read, unless we're talking about something different, Jim.

MR. RUHLE: At the commencement of this hearing, rules were read which included no filming or picture-tak-

ing is permitted in this hearing room. We again request that you gentlemen not film while this matter is in progress.

MR. EHLKE: I can't speak for members of the press.

MR. RUHLE: There are other rules that apparently you were not here when they were read, and I would like you to have a copy of those.

MR. EHLKE: I have just been handed a copy of six rules for the hearing held in April, 1974. The rules are 1. Smoking of any sort is prohibited in the building; 2. Silence is required unless one is asked to speak; 3. No filming or picture-taking is permitted in this hearing room. This is for the benefit of folks who weren't here earlier; 4. Only the door furthest from where the board is sitting will be used; 5. Only the lavatory services nearest this room are available for use; 6. Persons not respecting these rules will be permitted to leave the premises immediately. Was the rule not to take pictures?

MR. RUHLE The rule was not so limited. Gentlemen, are you going to insist on remaining and filming?

VOICE: Yes.

MR. RUHLE: I suggest we adjourn the proceedings for a few minutes. If Mr. Ehlke wishes to be heard on that, let's hear his position.

MR. EHLKE: I have not had any position from members of the Press and I don't know what their intentions or purpose is relative to taking pictures—interviewing, or whatever. You did ask me on these various individuals and I suggest we get on with the hearing. Maybe we should be bargaining.

MR. WEIHING: I grant counsel's request that we adjourn for a few minutes.

* * *

MR. RUHLE: Let the record show we are back into session at 12:09. Let the record also show in that 15 minute caucus, the Board re-evaluated the rule. We think that there is a legitimate interest in the media. We notice that there are not the lights which we feared would be a problem and if those people present, and counsel has no objection to the filming of the proceedings, we have no objection.

Now did you have a position, Mr. Ehlke, that you wanted to state, or are we back on the question of how to handle the hearings that are scheduled from 11:00 o'clock on?

MR. EHLKE: Position relative to what? You mean the media?

MR. RUHLE: No. You were going to speak with your people, whether we sit here all day and evening to handle the people as they came up. Have you made determination as to how you wish to proceed on that?

MR. EHLKE: Yes, I have conferred with the individuals who have written to me asking Lawton & Cates to represent them in this matter in matters arising out of this dispute. Incidentally, not all of the people have asked us to represent them, but Tonia Stamborski hasn't asked us to represent her in the dispute, but the other teachers have. They are as follows, and they are also individuals who have been served. I will read these names: John Amburgy, James Olson, Russ Hildebrand, Peter Jeffers, Darrell Johnson, Paul Kreul, Rosemarie Lauer, Tom Nadeau, Nanay Olson—incidentally, it's Mrs. Michael Olson, not Dennis Olson; Lila Nelson, Robert Newhouse, James O'Hern, Ruth Qualmann, John Quinn, Michael Ratsch, Rosemarie Olsen, Ardis Dobberstein, Kathleen

Weyenberg, Leslie Ellis, Carol Gruetzmacher, Ryan Hmielewski, James Larget, Carol Hoffman. Winifred Laabs, Ken Couillard, Donna Couillard, Ruby Abendroth, Marilyn Zimmer, Avis Sasse, David Hanke, Pat Grall, Michael Wisnoski, Linda Sue Bradley, David Emerich, Richard Fraaza, Dave Hettiger, Kay Jacobson, Rusna Keller, Tharen Robson, Kathleen Wilson, Ray Emerich, Richard Fraaza. Dave Hettiger, Kay Jacobson, Russel Lichte, Wilhelmine Pollard, Jack Rickaby, Ethel Beyer, Laura Cleven, Esther Emling, Nancy Miller, Elaine Exenberger, Mabel Grummer, Kathryn Herb, Sandra Herwig, Eleana Jurkowski, Mary Keller, Lois Lukesh, Susan Sachs, Carolyn Suess, Joy VanThiel, John Stieves, Edward Weber, Linda Wiegandt, Mildred Eisenreich, Ronald Hammond, Edith Haupt, Quintin Thede, Betty Edler, John Schindhelm, Catherine Schnoir, Karen Zeinert, Jean Wall, Kenneth Mertons, Judy Murphy, Patricia Weber, Jerry Addie, Gwendoline Alexander, Ruth Bruzewitz, Eleanor Krause and Jean Larson. All of those individuals have asked that I represent them in this particular matter; all those individuals have been served with this notice thing with either a blue backing or a white backing. As I understand it, there are as I have indicated—

MR. RUHLE: May I ask for two clarifications on that list. The name of that woman is Linda Thielke. Also, I have another question.

MR. EHLKE: I just checked my files and Linda Thielke has not requested that Lawton & Case represent her relative to the labor dispute, and I have been further informed that this lady is a part time teacher. Apparently the Union was unaware of her—she apparently doesn't have a written contract. To my knowledge she is not present, and I

know that she has not requested us to represent her. Which is also the case, of course, with Tonia Stamborski.

MR. RUHLE: I would like to also clarify Miss Triolo.

MR. EHLKE: To my knowledge, she is not present today.

MR. RUHLE: In any event, you did not mean to read that you represented her.

MR. EHLKE: No, I read the names of the people I represent that are here today. Yes, Carlarae Triolo has requested that we represent her, but she isn't here today, to my knowledge. Also Thomas Bellaire and Nancy Miller have asked us to represent them in this dispute, and they also to my knowledge are not present today, and to my knowledge have not been served with any kind of notice that they should come over today. And the same would be true with Mrs. Triola.

MR. RUHLE: Let the record show that Nancy Miller, Thomas Bellair and Mrs. Stamborski have not been served with notice.

MR. EHLKE: Weis is her maiden name—Stamborski is her married name.

MR. RUHLE: Mrs. Ballaire and Nancy Miller have requested that you keep them?

MR. EHLKE: Yes, but they haven't been served.

MR. RUHLE: Yes, and Mrs. Triola to my knowledge, has not been served. Mr. Ehlke, I don't mean to interrupt, but—

MR. EHLKE: That what I just related to you are the names of the individuals who have requested that I represent them and who are present today, and I have spoken to those individuals relative to proceeding in this matter, and each of them individually has indicated to me their

desire to follow my advice. This present matter and questioning by counsel for management in this labor dispute is coercive, is an interrogation, and the matters which are, management has informed it needs relative to who was working and not working, who was locked out and not locked out, and all that stuff. Any other questions would be interference with the individual's rights, and any other questions management may have concerning the dispute, should be addressed to representatives of the Union who represents all of these people, and indeed, your representatives stand ready right now to meet in bargaining agreement with the Board. If one-tenth of the effort that has been put into this hearing so far would be put into bargaining, we would be much closer to agreement than we are right now.

MR. RUHLE: Let's see if I properly understand here.

MR. EHLKE: We want to bargain.

MR. RUHLE: Do the individual teachers that you named wish to have their particular hearing called now so that they may respond, or so that you may respond on their behalf, so they would not answer questions, and so forth?

MR. EHLKE: We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of the management, and accordingly, they all stand together, and I represent all of them who I have indicated who are present today, and we believe if you are going to have a hearing and want to proceed, you proceed in all of the cases in one hearing, because they all involve

the same matters, and an attempt to single them out would be highly inappropriate. If you want to settle a matter, the thing not to do is pick out individuals. You sit down at the bargaining table and bargain. So we don't know what's on your mind, other than you certainly have as much knowledge of it as we do. If you want to proceed on hearing, it will be a hearing involving all these matters together.

MR. RUHLE: Have your clients authorized you to waive for them, to proceed in the matter in which the manner the Board has notified them the Board is proceeding?

MR. EHLKE: I think they have, but I would like to confirm it.

MR. RUHLE: I am concerned that the record shows that the individual teachers whom you have indicated you represent and have been served—and I am only talking about those individuals—waived their rights to the individual hearing as scheduled by the Board; they waived their right to make a statement to the Board; that they refused to answer questions that counsel might ask them in the manner in which they have been notified we were proceeding; and further that the Board may draw any inferences permitted by law for the Board to draw, based on their refusal to answer questions asked of them. I don't want to argue with you.

MR. EHLKE: I don't want to argue with you either, I just want to say that questioning—that's the reason why the general public thinks poorly of lawyers, because we are sitting here counting angels on a pinhead.

I will ask them questions and we will be back with you in about three minutes. I think this is beginning to be a lot of nonsense, and I am embarrassed for my profession.

MR. RUHLE: I am also sorry those present don't understand what we are attempting to do.

MR. EHLKE: You can argue what you are attempting to do. The question is, why don't you folks think about bargaining? As I understand it, you are prepared to sit here a few days, so why not take a shot for a couple hours this afternoon?

(Adjournment from 12:30 to 12:43 noon.)

MR. EHLKE: Is the Board ready?

MR. RUHLE: Yes.

MR. EHLKE: I consulted with my clients and we have discussed whether or not they wish to have a single hearing if you insist on going ahead with the thing on individual hearings. I have asked them if they understand relative to answering questions, and further we have discussed implications of their refusing to answer your questions, and with respect to refusing to answer your questions they have again repeated that they wish to follow my advice and not answer questions because of their interrogatory nature, and under the present circumstances the problem that exists, with questions by counsel from management being coercion and harrassment in a labor dispute such as this, they want the Union to answer questions for them, if you have questions. As far as the ramifications of their refusing to answer questions, I have conferred with Mr. Ruhle, and he has confirmed my understanding, and I have so discussed it with my clients, that the implication Mr. Ruhle referred to was that if these people do not answer questions propounded by Mr. Ruhle, it might be concluded they are engaged in a work stoppage, and that as I understand it, is the only inference that may be permitted in answer to the charges set forth in this document which is either bluebacked or white-backed notice of the thing today. There is in that charge, the sentence reads: 'You have breached your individual employment contract—you have engaged or participated in an unlawful strike contrary to Wisconsin law', and I would point out regardless whatever facts or inferences you folks think you might draw of failure of these people to respond to questions, that only goes to fact, the fact of breaching a contract is a legal question, and no individual can testify to that as a fact. Nor can any legal conclusion be drawn from a factual inference, and the same holds true with respect to illegality of a strike.

So again these people have advised me they will not answer questions for the reasons I have repeated over and over again.

They have also advised me to advise you that they wish, since they are all charged with the same thing, any hearing you wish to have should involve all of them and they don't wish to have individual hearings. As I understand it, individual hearings that have been scheduled would run through Wednesday and the evenings, and these people would much rather see the Board spending its time and the time of representatives of these employees, attempting to negotiate, to bargain in agreement, and to get this thing settled.

MR. RUHLE: Did I understand correctly previously when you went through the list of teachers that you represent, those were employees who had been served, with the exception you do represnt Mr. Bellaire, you represent one Mrs. Stamborski and Nancy Miller who are teachers who have not been served, is that correct?

MR. EHLKE: No, that is not correct. I have been asked

by Mr. Bellaire and Nancy Miller to represent them. They have not been served relative to any of these meetings or whatever we are doing this morning, Tuesday and Wednesday. Accordingly, my clients, Bellaire and Nancy Miller are not present for that reason. Mrs. Stamborski hasn't requested my representation or representation of Lawton and Cates. Mrs. Carlarae Triolo on the other hand has requested that we represent her in the dispute and furthermore I understand that she has been served with a document, I don't know if white or blue backing, but she has been served with a notice regarding these things we are doing at the present time. However, I have been unable to speak with Mrs. Triolo because she is a part time teacher and as I understand it, spends half her week working in a different school district and presently employed working at her other job, and as a result isn't available and hasn't been available to talk to me in the present proceedings, although she has asked me to represent her.

MR. RUHLE: With respect to Mrs. Triolo, would you agree to contact her and see if she takes the same position your other clients take, and notify us of that? If we have not heard from you, we will be present at 11:30 on Wednesday. What I want to do is see if we can find some acceptable way to not convene if Mrs. Triolo wishes to be represented.

MR. EHLKE: With that knowledge, we agree to do that, and I will make an attempt to do that in the next hour or two or as soon as the present proceedings are adjourned or whatever. Again, the reason we are interested in expediting these things, if you scheduled this much time to have hearings, it seems to me we have an ideal situation to spend some time bargaining. If we can shorten up the hearings, as I understand your schedule, at least

the rest of the day until 10:30 and Tuesday and Wednesday you have scheduled yourselves for school meets, and this would be a real good time to settle your bargaining problem. That's the only thing that's ever going to settle your dispute and you have a good chance to do it now.

MR. RUHLE: For clarification, Bruce, it was also your representation that those teachers, the names of which you read off, are present today, is that correct?

MR. EHLKE: Right. Mrs. Triolo was the only one served with a document who isn't present today, and that's because of her other employment.

MR. RUHLE: And you will let us know if she wants to have a hearing on Wednesday at 11:30?

MR. EHLKE: Right.

MR. RUHLE: And if she does, her position will be the same as your other clients?

MR. EHLKE: Yes.

MR. RUHLE: I have nothing else. Does anyone have anything else for the record? If not, I think the President can adjourn—

MR. EHLKE: Just a second. Let me think about it. Can I take five minutes to consult in the hallway?

MR. RUHLE: Sure.

MR. EHLKE: My first question is, in effect, because of the Board's involvement as to managment of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and the employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that.

MR. RUHLE: As I advised you on the 'phone yesterday, the Board is the proper party in the first instance to make decisions of this sort, and it will do so, sir.

MR. EHLKE: They are prepared to hold a hearing?

MR. RUHLE: You have your objection on the record.

MR. EHLKE: Do I understand it then, management people are resting their case?

MR. RUHLE: I understand management was forced to rest their case because the parties will not participate in hearings as planned by the Board.

MR. EHLKE: Without waiving our total objection to this proceeding, to the lack of timely notice, and opportunity to prepare and to the Board sitting as the judge in this matter, we do have some evidence we would like to put into the record.

MR. RUHLE: I would like you to be more specific on your timely notice objection. You stated your nature of the objection, that the teachers were served beginning Friday evening and some on Saturday, and this morning we were talking about it, they were served Friday evening. You did not make any request of the board that those matters be adjourned. I don't want you to reserve your argument on timely notice without being a little more specific for us in terms of what you feel would be necessary for you to represent those people who were scheduled for hearing between 9:00 and 11:20 this morning.

MR. EHLKE: To the extent that you aren't offering any evidence against any specific individual, we are prepared at this time to present some evidence just for the purposes of the record, not litigation or defense. But that doesn't waive our objection to the general manner in

which these proceedings have been held, in particular to the fact that the Board is purporting to sit as judge.

MR. RUHLE: I understand that, Mr. Ehlke, but still you raised several problems, one that the Board is the maker, #1, is timely notice. I want you to have opportunity to be prepared if you intend to represent those people in the production of evidence.

MR. EHLKE: We are wasting everybody's time with these hearings, to begin with. What I would like to do at this time is put in the evidence I have, and if at the conclusion of that I find I need more time, I will let you know at that time. But I don't think it serves anybody any good to sit here all the time and not do anything, or even to have some kind of a reconvened date. That doesn't make sense at all. You have to get this thing resolved and the best way is to bargain. We will put in our recitation right now, what we have.

MR. RUHLE: But your position remains the same with reference to the Board putting in evidence, whatever it wants to put in?

MR. EHLKE: Sure. You have rested your case.

MR. RUHLE: All I want the record to reflect is whether this reflects difference in position in asking each particular teacher some questions.

MR. EHLKE: No, and I don't intend to call each individual teacher.

MR. RUHLE: Will you give us some kind of inkling as to the nature of the evidence you wish to present?

MR. EHLKE: Yes, it goes to bargaining here, and I have some questions of some of the Board members.

MR. RUHLE: I will advise the Board as I think I advised you on the telephone yesterday, that the bargain-

ing is immaterial to the allegations in the notices. They are immaterial.

MR. EHLKE: Then I would like to make an Offer of Proof.

MR. RUHLE: All right, you may do so.

MR. EHLKE: Our Offer would be that the proposals for the 1974/1975 as presently on the table; were not significant representation, regressive—in particular the salary schedule structure, and regressive salary schedule; the grievance datelines were regressive; the proposals regarding work-day previously agreed to which the parties and the employer was proposing to have unilateral, which no employee in their right mind could agree to. There was a proposal the Board made to be included in the 1974/1975 collective bargaining agreement that had to do with professional responsibility, but it was a proposal that attempted to govern the interim affairs of the Union, and that's wrong. We would furthermore put into evidence that relative to the calendar for 1973/1974 schocl year, the Board acted through its agents, Mr. Obry, I believe it was the whole student body, and it is our position that is interference in the bargaining process, it is a coersive device, attempted to bring an outside party to the bargaining table—in this case, the student body. Furthermore, the Board has refused to discuss insurance provisions proposed by the Union; has refused to discuss a fair share. Since this action began, at least in the last two weeks, in response to numerous requests by the Union seeking bargaining and attempting to resolve the parties' differences at the bargaining table, which is where it has to be resolved, the Board has refused these overtures and instead has done what we are at today here.

We further would prove that the Union wasn't notified of the efforts of the overtures to the individual employees which brought them here today. The Union wasn't notified previously when the employees were disciplined by docking of their pay, and this is a denial of the employees' right to be represented; unilateral dealing, which is unlawful.

We further would prove some of the lost teaching time has been occasioned by employees being locked out of their places of employment. In fact, as I understand it, one time chains were put on the door which not only constituted violation of the labor law, but as I understand it, is violation of the safe place statute. There were children in the building when chains were put on the doors, locking them in.

Furthermore, relative to information concerning salary—and that's one of the big items that presently divides the parties—officers of the Union and particutarly Mr. Wieniewski and Mr. Counard have been denied information they sought information on, in February. They requested certain information in March, March 31st of this year, and that information was denied to the Union. That information was pertinent to the salary negotiations which are one of the things still on the table.

I think we can prove since this bargaining began, and that was in January, 1973, believe it or not, the makeup of the Board's bargaining committee has changed in considerable respects. People have left and other people have come on; the spokesman has changed: one time Mr. Vergimos, one time Mr. Brakway served as spokesman, Mr. Brown served as spokesman, and all of this has had a tendency to undermine the bargaining process, and

made bargaining virtually impossible. If you keep changing personnel and spokesmen, how in the world can you resolve differences. That's what we will show. That is the information I have been able to learn, that I have been advised of, and I would be prepared, and also prepared to put into the record through witnesses today. There may be more, but I haven't had a chance to investigate the matter that fully, because of time limitations.

MR. RUHLE: Mr. Ehlke, I would like to very briefly respond to the Offer of Proof.

MR. EHLKE: Do you have counter-offer of proof?

MR. RUHLE: The record reflects that I am responding to the Offer of Prove. Now could I proceed?

MR. EHLKE: It depends on what your purpose is. If you have a counter-action to prove that would be appropriate.

MR. RUHLE: My recommendation to the Board is that it did not consider evidence of the sort enumerated in Mr. Ehlke's Offer of Proof. It is on the one hand immaterial to the alleged conduct; it is on the other hand the right kind of allegation and form of adjudication of allegations, and then, of course, the Board doesn't need to defend itself against allegations that are to the extent directed one-sided. So I would recommend that they not permit Mr. Ehlke to proceed to prove what he has just offered to prove.

MR. WEIHING: Is it so ordered.

MR. EHLKE: I certainly think it is.

MR. RUHLE: I am sure you do, Mr. Ehlke, because you have offered to prove it.

MR. EHLKE: If your employees are engaged in work stoppage there is provocation, and if there is provocation,

it certainly has something to do with whether or not you're going to discharge them. That's what you are talking about here, when you are talking about breaching a contract and discharging somebody, because of that. There has to be just cause. Maybe you did punch the foreman in the mouth, but if he provoked it and caused it to happen, then that act of punching him in the mouth isn't cause for discharge. If more than your employees are engaged in work stoppage, perhaps some conduct by management people is a prerogative and certainly should be taken into consideration if you are going to discharge somebody. That's why it is material and relevant. As far as appropriate forms going out, as I said before, we objected to this proceeding, but beyond that it isn't going to do us any good, nor you, if we go to Employment Relations Commission with complaints that you have been bargaining in bad faith or we have been bargaining in bad faith. It isn't going to do you any good to have hearings or things we have done today. We can all stand and say we are people of principle and I am standing on my rights, and these people too, or you people may be doing. We must settle, and to do that you have to sit at the table and bargain, and we could do it in half the time you have already scheduled for whatever those things are with your employees. That's the only way you're going to settle it.

We are ready and these people are ready to meet with you and bargain with you two hours from now, one hour from now, a half hour from now, or three fours from now, and to bargain with you through the evening. The time you scheduled these things tomorrow, we will bargain with you then. That's the way to solve the problem. We are asking to bargain.

MR. RUHLE: I thought we had set this matter behind

us on the individuals involved, but I don't think we addressed the question of Mr. Bellaire and Miss Miller who have not been served. The only question I have, I foresee the necessity for serving them with a Notice of Hearing.

MR. EHLKE: Why don't you bargain in agreement, Jim. By the time you have them served, the whole thing would be over with and you wouldn't have to be fooling around with it.

MR. RUHLE: Mr. Ehlke, there are many ways to dissolve a labor dispute.

MR. EHLKE: Meeting at the bargaining table is the way to do it.

MR. RUHLE: Mr. Ehlke, if we have refused to do that, you have your forum.

MR. EHLKE: That is not going to solve the problem.

MR. RUHLE: That, Mr. Ehlke, is a concern of mine, because the board has set a specific purpose for today and it is not to consider whether WEAC is a proper forum for improper conduct by the Board. Mr. Bellaire and Miss Miller will be receiving a notice unless we have a different arrangement with respect to a hearing. I don't know if you are prepared to inform us what their position is, or not.

MR. EHLKE: Frankly, I am not, at this time. You go ahead and serve them. But in the meantime, the Board has a few words left. As I understand it, the Board or its agents know where representatives of the Association will be contacted, and they will be there waiting with hope in mind that the Board will contact them and try to bargain, starting today.

MR. WEIHING: If there is nothing more, the hearing is adjourned.

(ADJOURNMENT: 1:20 o'clock p.m. 4/1/74.)

STATE OF WISCONSIN

ss.

COUNTY OF BROWN

I, Eunice L. Reynolds, a Certified Stenographic Reporter, with offices located at 822 South Jackson Street, Green Bay, Brown County, Wisconsin, do hereby certify that I reported and transcribed to writing the foregoing Hearing in re: Striking Teachers, held before the Hortonville School Board, on Monday, April 1, 1974, at 9:00 o'clock a.m.;

That the same is true and correct (except perhaps as to phonetic spelling of names) according to my original shorthand notes taken at said time, and the whole thereof.

Dated this 4th day of April, 1974.

/s/ EUNICE L. REYNODS

[EXHIBIT # 9, APRIL, 1974]

BOARD OF EDUCATION

HEARING OF: Mrs. Toni Stamborski, held at the Hortonville High School in Hortonville, Wisconsin, on the 1st day of April, 1974, A.D., held before the Board of Education.

APPEARANCES: MR. JAMES K. RUHLY of Madison, Wisconsin, and MR. DAVID BRATHWAITE appeared on behalf of the Hortonville Community Schools.

MRS. TONI STAMBORSKI appeared without counsel.

MR. RUHLY: May I proceed, Mr. President?
MR. PRESIDENT: Proceed, Counsel.

TONI STAMBORSKI, being first duly sworn on oath, was examined and testified as follows:

EXAMINATION:

BY MR. RUHLY:

Q Your name is Mrs. Stamborski?

A Yes.

Q And the first name is?

A Toni.

Q Mrs. Stamborski, you are employed, are you not, by the Hortonville Community Schools?

A Yes.

Q Let me show you a document, the typed portion of which is a document addressed to you and I ask you if you ever seen that document before?

A No.

Q Okay. Mrs. Stamborski, earlier this afternoon did you and I—I might state my name is James Ruhly—did we have a telephone conversation?

A Yes.

Q And did you at that time inquire as to whether it would be possible for you to have a hearing this afternoon?

A Yes.

Q And did I at that time advise you that you had a right to written notice of the hearing and the reason?

A Yes.

Q And did you advise me that you would waive your rights to those?

A Yes.

Q Did I also advise you we were concerned here with the allegations that you have breached your individu-

al employment contract and that you have engaged in an unlawful strike contrary to Wisconsin Law?

A Yes.

Q And did I advise you on the telephone that you had a right to appear with counsel if you desired?

A Yes.

Q Now, Mrs. Stamborski, this morning Attorney Bruce Ehlke, representing several other teachers, appeared and asserted to the Board that Mr. Ehlke did not represent you, is that true?

A Yes.

Q And do you have counsel that you would like to have with you today?

A No.

Q Okay. Mrs. Stamborski, the Board previously had set hearing with you for Tuesday April 2nd, 1974, at 8:20 o'clock in the forenoon. Do I understand that you would like to proceed with that hearing at this time?

A Yes.

Q And in the document that you just identified as having never seen before, that document advises you that you have an opportunity to present any statement or evidence relevant to the alleged conduct that I enumerated previously, and did I so inform you on the telephone this afternoon?

A Yes.

Q Do you have any evidence or statement relevant to the allegations that you would like to present to the Board at this time?

A I don't quite follow all that.

Q Okay. Do you have any evidence or any statement that you would like to present to the Board or say to the

Board at this time with respect to the allegations that you breached your individual employment contract and that you engaged in an unlawful strike contrary to Wisconsin Law?

A No, I guess. No.

Q Mrs. Stamborski, did you in fact absent yourself from your teaching duties the weeks beginning March 18th and March 25th?

A Yes.

Q Where you ill during that period of time?

A No. I think I have a ulcer now, though.

Q Okay. Can you tell us why you were not at school during that time, those two weeks?

A I don't want to be harrassed, that's why I didn't come back, afraid.

Q You were afraid of what?

A Just my relationship with the other teachers if I came back.

Q Okay. You do have an individual teaching contract for this year, do you not?

A Yes.

Q Since March 18th have you received several communications from the Board of Education signed by Mr. Obry?

A Yes.

Q Did you read those communications?

A Yes.

Q Let me show you particularly a letter dated March 23rd, 1974. That does not have a salutation or does not have a name in the salutation area and is signed on the second page by Marvin Obry, and I ask you did you receive a copy of that letter?

A Yes.

Q Did you read the letter?

A Yes.

Q Yes?

A Yes.

MR. RUHLY: Off the record.

(Discussion off the record.)

Q Back on the record. Mrs. Stamborski, I show you a one-page document that purports to bear the signature of Toni Weix. Was that your maiden name?

A Yes.

Q That was your name I take it on or about March 12 last year?

A Yes.

Q And that is your signature?

A Yes.

Q Okay. And is this a copy of your individual teaching contract?

A Yes.

Q Now, also in the notice, the written notice, which you have waived your right to receive but which other individuals have received, the Board points out that the conduct that you have engaged in or that you were alleged to have engaged in subjects you to disciplinary action by the Board including termination of your employment contract that you have identified and acknowledged that individual teaching contract which incorporates entirely collective bargaining agreements dated May 8th, 1972, and which also purports and states that it is a solemn and binding contract not to be breached by either party without good or sufficient grounds. I would like to ask you has your absence from work the weeks of March

18th and 25th been based on good and sufficient grounds, and if so would you advise the Board what those grounds are?

A Well, I think it's with grounds. I just have been afraid to come back, that's all. It's not that I haven't wanted to teach. I'd just as soon not have a really poor relationship because things can be rough at the end of the year. I just didn't want things made really rough.

Q Were you picketing during part of the time?

A Two days I did.

Q What days were those, do you recall?

A The first two days.

Q March 18th and 19th?

A Yes.

Q You have not picketed since that time?

A No.

Q Have you discussed with your Association representative your feeling about wanting to return to work?

A No.

Q Okay. Have you considered your absence from school those two weeks to be part of a strike activity by your bargaining representative?

A No.

Q Will you tell us what you have considered you absence to be because of or due to?

A Because of being afraid.

Q And this fear, as I understand it, is a fear of what?

A Of my colleagues, you know, just of being harrassed and that type of thing.

Q Okay. Was that also the reason that you were not in school on March 18th and 19th?

A Well, March 18th I came to see what was going on

more or less, you know, to see what was happening. That was probably the only reasons I came.

Q What about March 19th?

A I came to see what I had involved myself in so I could make up my mind from there.

Q With respect to the 19th, what was the reason for your absence on the 19th?

A I think more or less just relationship with the teachers. Then I decided after that that my teaching was more important than my relationship, so that's why I didn't continue coming.

Q Now, has there been any period in those two weeks beginning March 18th and March 25th when you have been prevented by the School System from returning to work?

A No.

Q And were you aware that your colleagues were engaged in a concerted work stoppage against the School District?

A Yes.

Q Now, that's all the questions that I have. I would like you to say anything that you would like to say to the Board keeping in mind the alternatives that the Board has if it finds you guilty of the alleged conduct, specifically keeping in mind that this could subject you to termination of employment. Is there anything you would like the Board to know prior to its consideration of that question?

A No.

MR. RUHLY: Do you have any questions?

MR. BRATHWAITE: No.

MR. RUHLY: Does any Board member of any questions they want to ask Mrs. Stamborski?

(No response.)

MR. RUHLY: Okay. That would conclude the matter.

(Witness excused.)

CERTIFICATE:

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

I, James F. Henes, Official Court Reporter and Notary Public in and for Outagamime County, Wisconsin, do hereby certify that the foregoing proceedings were reported by me in Shorthand and reduced to writing by me and is a complete, accurate and true transcript of said proceedings.

DATED: April 3, 1974

/s/ JAMES F. HENES
Court Reporter

[EXHIBIT 10, APRIL, 1974]

BOARD OF EDUCATION:

The following proceedings were had at the Hortonville High School in Hortonville, Wisconsin, on the 2nd day of April, 1974, A.D., held before the Board of Education.

APPEARANCES: MR. JAMES K. RUHLY of Madison, Wisconsin, and MR. DAVID BRATHWAITE of Hortonville, Wisconsin, appeared on behalf of the Hortonville Community Schools.

LAWTON & CATES of Madison, Wisconsin, MR. BRUCE EHLKE of that firm appeared on behalf of Nancy Miller, Linda Thielke, Carla Triolo and Thomas Belaire.

THE PRESIDENT: Counsel, are you ready to proceed?

MR. RUHLY: Are you, Bruce?

MR. EHLKE: Yes, As I understand it, Mr. Ruhly and I had several phone conversations and questions regarding a number of people who had not at that time been served with your notices of this meeting you wanted to have, Monday, Tuesday and Wednesday and also—or who had received a copy of that notice and had not—were not present yesterday, and the question that Mr. Ruhly had was what was the position of these people concerning having separate hearings and concerning answering questions propounded by the management, and the people in question were Nancy Miller, Linda Thielke, Carla Triolo and Tom Belaire. Are there any others, Jim?

MR. RUHLY: I think that covers it, Bruce.

MR. EHLKE: Okay. Well, now, I have contacted these people. All of them requested that the law firm of Lawton & Cates represent them in all matters concerning the labor dispute, and the position of these people is as follows: Nancy Miller and Linda Thielke and Carla Triolo take the position that as far as individual hearings they adopt the same position as all other teachers who were present yesterday and that is they wish their employment to be considered in the same boat as all the other employees, the teaching employees, and they do not wish to have a separate hearing or a separate session with the Board of Education. The union or the Hortonville School Association is their representative and will speak for them, and in

that same vain it's further their position that if any questions—if there was an attempt to propound any questions to them by management or its agents, they would refuse to answer those questions for the same reason that the other employees refused to answer those questions, which were that the union represents them and that an attempt to question them as individuals would be improper. Mr. Belaire adopts the same position. He has requested that as his lawyer I make a personal statement on his behalf, which is that he believes that the only way to settle this matter, and I believe he may have expressed this sentiment to Mr. Obry last night, the only way to settle the matter is for the Board of Education to bargin an agreement to reach an agreement with the Hortonville Education Association and the people it represents; that so long as there is no bargaining session scheduled, it would be senseless for him to have any kind of an individual hearing or to answer any questions by management agent, and for that reason he personally makes the plea that the Board bargain with the Association. He wishes his case to be considered. He doesn't want a separate hearing. He wants his matter to be considered with all the other teachers, and he says there is no purpose in answering any questions.

I believe that covers it unless you have any other questions, Jim.

MR. RUHLY: Just a second, please. Mr. Ehlke, for purposes of the record, do I understand that Miss Miller waives her right to have a personal copy of the charges served upon her prior to having you make this statement for her? I assume that to be the case.

MR. EHLKE: I would assume it to be the case. She

has asked that I relate that to you. I don't know if she has been served a copy or not.

MR. RUHLY: She hasn't.

MR. EHLKE: I thought she had been.

MR. RUHLY: I don't believe she has. One of the items that we discussed yesterday was whether we could serve Miller and Belaire just prior to a hearing if we could have the hearing today, and because Mr. Belaire yesterday took a position that he would take no position before receiving the charges, he was served yesterday evening.

MR. EHLKE, By yourself I understand.

MR. RUHLY: By me. And Miss Miller has not been served.

MR. EHLKE: I don't know if she has been served or not, but she has asked me to relate to you what I have just related to you, and I guess that's her position.

MR. RUHLY: Okay.

MR. EHLKE: So if you want to serve here with something, she said her position is she wants to be judged with all the rest and that she wouldn't answer any questions that were attempted to be put to her by management agent.

MR. RUHLY: When you spoke with Mr. Belaire, did he raise any question with respect to the fact that he received the charges or the notice last night, any question with respect to taking a position by 10:20 this morning, did he raise any question with you?

MR. EHLKE: He had a question with the hearing time that was scheduled, which was tomorrow as he informed me; that there was a question of short notice, but his primary concern was the fact that there was no bargaining comment.

MR. RUHLY: He authorized you to make this statement to the Board that you have made?

MR. EHLKE: Yes, he did.

MR. RUHLY: Okay, Mr. Ehlke. for the record could we note the appearances. You don't have to necessarily note those gentlemen who are here to observe, but I would note that Mr. Watson is with Mr. Ehlke today. Are there other apperances on the record?

MR. EHLKE: Okay. Well, of course, I am here as you are aware because I have been talking.

MR. RUHLY: Glad to get that clarified.

MR. EHLKE: And as you have indicated, Mr. Watson is here, the five representatives of the Hortonville Education Association, and I will ask them each individually to identify themselves.

MR. LICHTE: Russell Lichte.

MR. OLSON: James Olson.

MR. ELLIS: Lesley Ellis.

MR. LARGET: James Larget.

MR. ADDIE: Jerry Addie.

MR. RUHLY: Let the record also note that the seven Board members are present as is Mr. Braithwaite and Mr. Obry and James Ruhly.

MR. EHLKE: And another man.

MR. RUHLY: And Mr. Sean Brown just came in, but he is not representing the School Board here.

MR. EHLKE: Is that Mr. Sean Brown of the Wisconsin Association of School Board fame?

MR. RUHLY: Yes. Is there anything else, Mr. Ehlke that you or Mr. Watson wanted to state for the record?

MR. EHLKE: No. Merely that again as we said yesterday, that the only way to solve this matter is to reach an agreement, and it seems to me we expended a lot of energy and time in the last thirty-six hours and we haven't done

anything really to get together to work out an agreement which is the only way that the matter is finally going to be resolved. I would hope we can hear from the Board sometime very shortly regarding a meeting to bargain.

MR. RUHLY: Let the record show Mr. Ehlke stated that position yesterday and I responded to that position. If there is nothing else that you have, gentlemen, thank you and I guess that would conclude the hearing.

THE PRESIDENT: Let the record show the hearing was adjourned at 10:38.

MR. EHLKE: While we're on the record—

MR. RUHLY: Why do you want to go on the record?

MR. EHLKE: Just for the fun of it. This morning I served David Brathwaite, the Attorney for the Board on the replevin action. It's the case that says "give us back our keys." In that case I served Mr. Brathwaite with copies of notice of retainer and request for change of Judge in that matter which had been scheduled for tomorrow; is that correct, Mr. Brathwaite?

MR. BRATHWAITE: That's correct.

MR. EHLKE: Okay.

(End of proceedings.)

CERTIFICATE:

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

I, James F. Henes, Official Court Reporter and Notary Public in and for Outagamie County, Wisconsin, do hereby certify that the foregoing proceedings were reported by me in Shorthand and reduced to writing by me and is a complete, accurate and true transcript of said proceedings.

DATED: April 3, 1974

/s/ JAMES F. HENES
Court Reporter

[EXHIBIT #11, APRIL 11, 1974]

STRIKE INFORMATION

The teachers strike called by the Hortonville Education Association this morning is the result of an ultimatum made by the teachers earlier this year when they said that unless an agreement for the 1974-75 school years was reached by March 15, they would strike. So despite the fact that negotiations were progressing on both March 15 and 16 and despite the fact that both the Board and teachers have agreed on a settlement for this school year, the teachers went on strike.

Previous to this, the Board, upon the HEA's insistence, agreed to submit to fact finding to resolve the differences between the two parties. David Johnson, a professor of economics at the University of Wisconsin, Madison, was selected by both the HEA and school board to serve as the fact finder. Johnson, a well-known author on labor relations, worked in employee relations for the U.S. Atomic Energy Commission and for the National Labor Relations Board.

His experience and expertise in the labor relations field were viewed favorably by both parties; however when his report came out, the HEA unilaterally rejected it, c'aiming that the criteria used by the professor in his findings of fact were not adequate. The school board, though, agreed to Johnson's conclusions and in turn were willing to implement them; but because of the teachers' rejection, the board, in an attempt to reach an accord, offered to

exceed the fact finder's recommendation on money by approximately $9,000. The HEA rejected this, too.

Representatives of the teachers' union and board resumed negotiations at the bargaining table and eventually came to a general agreement on contract proposals for the 1973-74 school year. Although both groups came to this agreement, the contract for this school year has not been officially ratified. Instead, the union representatives continue to refuse to formally accept it until a settlement for the next school year is reached. At the same time, the union arbitrarily set the March 15 deadline as a cut-off date for negotiations for a 1974-75 contract—this is despite the fact that most school districts in Wisconsin have just started negotiations for next year.

At the time the HEA gave its strike ultimatum to the Board, the teachers also told the Board it could have six meetings in which to discuss their 30-page proposal and to come to an acceptable agreement.

The money salary proposal of the teachers Association at present is approximately $36,000 higher than the Board offer. This is above and beyond the $75,000 Board package already offered.

Also requested is:

- A full dental insurance program, life insurance, sick leave coordinated disability, income protection and auto policy on teacher cars used to transport students. Total cost about $25,000 the first year.

This makes a total of $61,000 still being requested by the Association.

The present teacher proposal besides money includes such items as:

- Maintenance of standards clause (this means that the

Board could not ever take something away that is a present practice). Example: If it is a practice to let a teacher go to the bank during the school day, it could never be denied.

- Limiting the number of students to be placed in any room. What if the limit is set at 25 and 27 want to take the class?
- Agency shops—Every teacher will have to pay union dues.
- Twenty (20) Association days. This means officers and directors of the Association would get twenty days per year to do association business, with pay. Example: Negotiate during the school day.
- Plus the Association does not wish to accept the Board's modified no strike clause. This no strike clause of the School Board is the only one left on the table for the Board. The other six the Board had were dropped.

During the strike, the Board had four (4) options open to have teachers return to work. They were:

(a) meet their requests.

(b) fill the school with substitutes.

(c) ask for a court order returning them to class.

(d) send them a letter of termination and hire permanent replacements.

The Board choose option (b) because they felt the strike would be short lived. Options (c) and (d) are still available but the Board prefers not to upset the entire school community by declaring such drastic action as option (d).

The last page of this report indicates some of the school settlements in the area for 1974-75.

SALARY COMPARISONS

	1973-1974 BA / MA — HEA & Board Proposal	1974-75 BA / MA — Board Proposal
HORTONVILLE	7550/11627(13) 8200/12628(13) STRS - 3½%	7900/12166(13) 8550/13167(13) STRS - 4½%
KIMBERLY	7650/11628(13) 8150/13366(16) STRS - $175 - 375	7850/11932(13) 8350/13694(16) STRS - $250 - 500
LITTLE CHUTE	7600/11248(12) 8360/12373(12) STRS - $266 - 453	7800/11544(12) 8580/12698(12) STRS - $318 - 531
MERRILL	7500/11290(12) 8190/12700(12) STRS - 4.5%	7850/11813(12) 8540/13238(12) STRS - 4.5%
OCONTO	7450/11470(12) 7950/12246(12) STRS - $225 - 525	7725/11901(12) 8325/12825(12) STRS - $225 - 525
SHAWANO	7600/11324(12) 8208/12768(12) STRS - 0-7 $200 8-14 225	7800/11622(12) 8424/13104(14) STRS - 0-7 $275 8-14 300
CLINTONVILLE	7500/ 8100/13420(14) STRS - 0-3 $105 4-7 138 8-11 168 12-16 200	7800/11300( ) 8400/13520( ) STRS - 5%
SHIOCTON	7300/10220(10) 7800/11888(14) STRS - NA	7700/10780(10) 8150(11)/ 12154(14) STRS - $215 - 0 250 - 5 375 - 10 500 - 15 600 - 16
APPLETON		8050/12341(13) 9016/14786(13) STRS - 5%
WILD ROSE		7850/10350(10) 8350/11350(12) STRS - $150 - 200 - 250

[EXHIBIT # 12, APRIL 11, 1974]

HORTONVILLE COMMUNITY SCHOOLS

April 2, 1974

A special school board meeting was called to order by Mr. Weihing at 1:30 PM and found all members of the school board present. Stated purpose of the meeting was what action if any the School Board will take to cope with the teacher's strike. Only personnel problems were discussed.

A motion was made by Mr. Suprise and seconded by Mrs. Meads to pass the resolution attached: (termination of contract) The vote for the resolution was unanimous: Mrs. Meads - yes; Mr. Plamann - yes: Mr. Meyer - yes; Mr. Hauk - yes; Mr. Schroth - yes; Mr. Suprise - yes; and Mr. Weihing - yes.

It was moved by Mr. Plamann and seconded by Mr. Schroth that the following resolution be adopted: Resolved, that the administration of the Hortonville Community Schools is directed by the Board of Education to immediately commence recruitment within and outside this district, of professional staff for the remainder of the 1973 - 74 school year; that the Superintendent shall notify the Board of Education by noon on Saturday, April 6, 1974, whether sufficient staff will be available for the reopening of schools on Monday, April 8, 1974. Motion was passed unanimously.

A motion was made by Mr. Meyer and seconded by Mr. Schroth to adjourn. Motion was carried.

R. Hauk, Clerk

RESOLUTION

Resolved, that all teachers, heretofore served with notice of hearing dated March 29, 1974, or who waived such service through legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, are guity of such conduct and are therefore hereby terminated as employees of this district, effective immediately, except Toni Stamborski; that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employees; that said notice shall inform such terminated employees that his or her district-paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated employees that they may apply for vacant positions in the District, and that Tonia Stamborski be sent a letter by the Board President reprimanding her for her participation in the unlawful strike and her breach of her employment contract, with a copy of said notice to be inserted in her personnel file; and that a copy of this resolution be sent to the President of the Hortonville Education Association.

Adopted by the Board of Education

April 2, 1974

[EXHIBIT # 13, APRIL 11, 1975]

HORTONVILLE COMMUNITY SCHOOLS

April 5, 1974

A special school board meeting was called to order by Mr. Weihing at 11:30 PM and found all members present - consent forms were signed.

The purpose of the meeting was to take action in the case of Margaret Powers.

It was moved by Mr. Plamann and seconded by Mrs. Meads to adopt the following resolution:

RESOLUTION

Resolved that Margaret Powers, heretofore served with notice of hearing dated April 3, 1974, or who waived such service though legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, is guilty of such conduct and are therefore hereby terminated as an employee of this district, effective immediately, that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employee; that said notice shall inform such terminated employee that her district paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated employee that they may apply for vacant positions in the District.

A roll call vote was taken for the motion and found

Suprise - yes; Schroth - yes; Hauk - yes, Meads - yes; Plamann - yes; Meyer - yes; Weihing - yes.

A motion was made by Mr. Meyer and seconded by Mr. Suprise to adjourn. Motion was carried.

R. Hauk, Clerk

STATE OF WISCONSIN OUTAGAMIE COUNTY CIRCUIT COURT

[Caption and appearances omitted from printing]

TRANSCRIPT OF DECISION ON APPELLANTS' MOTION FOR A TEMPORARY RESTRAINING ORDER

(From the Bench)

April 11, 1974

The Court: Ladies and gentlemen, I will read my decision in this case. I will ask that everyone who is in the courtroom remain present. I don't anticipate more than about fifteen, twenty minutes, so please remain present so we don't have people getting up and leaving during the course of my decision. And, Counsel, inasmuch as I did not interrupt arguments this afternoon I of course, request the same courtesy in delivering my opinion this evening.

As I am sure each one of you can realize perhaps the most difficult part of being a judge is to hear a case of this magnitude, a case that is not only important to the plaintiffs, not only important to the defendants but a case that reaches far beyond the walls of this courtroom. It reaches out to the people in the Hortonville School District, and perhaps most important—to the children in that school district.

Over the last couple of days you have heard many legal principles expounded here in the courtroom, some fine legal hairs split, arguments on evidence, but in the great scheme of things we shouldn't lose track of the fact that we are attempting to do justice, and that in a matter such as this, unfortunate as it is, the courtroom is the place where these decisions are to be made.

The Court's decision in this case is not going to resolve the conflict that now exists. As in any labor dispute the place to reach agreement is at the bargaining table, not in the courtroom, not on the streets, and not in the news media. I think most of you are aware that in the courtroom this evening are the three commissioners of the Wisconsin Employment Relations Commission and they have been here since yesterday. One of them since Sunday at my request. The other two joined us yesterday at the request of Governor Lucy [sic]. This is an important case and the eyes of the State are upon us. They are upon you the participants and how you conduct yourself after you leave the court room this evening.

I will now read my opinion.

The Circuit Court jurisdiction is created and limited by Article 7 Section 8 of the Wisconsin Constitution. I might just interrupt myself and preface any further remarks by saying I believe this case to be of such magnitude that the Court is going to couch its decision in legal terms as much as possible not for the sake of confusing you so that it takes you two hours to figure out what I said or what I did, but I think it is a case of such magnitude that either side may want to appeal the decision of this Court, therefore, my decision is basically in legal terminology so that I might facilitate that process, if that is sought.

The Constitution reads the Circuit Court shall have original jurisdiction in all matters civil and criminal within the state, not excepted in this Constitution, and not hereafter prohibited by law.

As to the matter now before the Court, I find no prohibition or limitation of this Court's jurisdiction in the Constitution.

As to applicable statutory law we must look to, first of all, Wisconsin Statute 253.03. That statute in broad terms delineates the board powers of the Circuit Court, limiting such powers only when exclusive jurisdiction is given to some other court. Within that same delineation, that statute expresses that, and I quote as to the powers of the Circuit Courts: "they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice."

The nature of the relief requested at this time is equitable in nature. The procedure utilized in seeking that equitable relief is by way of an application for a temporary injunction as controlled by Chapter 268 of the Wisconsin Statutes. A careful reading of that Chapter of the Statutes will indicate that reference is only made to courts of record, judges and court commissioners. There is noticeably absent from that Chapter express authority for administrative agencies granting injunctive relief.

However, the matter at Bar is one which unquestioningly arose out of a labor dispute. More specifically, a labor dispute in the public employment sector. As such, the Court must give due consideration to the provisions of Section 111.70 of the Wisconsin Statutes. That particular statute creates certain procedures to be followed when labor disputes arise in the public employment sector.

Briefly, Section 111.70 enumerates various prohibited practices as well as the power of the Wisconsin Employment Relations Commission in dealing with those prohibited practices. Furthermore, the procedures to be followed by the Wisconsin Employment Relations Commission in relation to those prohibited practices are controlled by Section 111.07 of the Statutes.

Upon a review of the pleadings, testimony and the evidence in this case by way of exhibits I find no prohibited practices as defined in Section 111.70(3) to either be alleged or proved. I can see no basis for jurisdiction in the Wisconsin Employment Relations Commission in the limited issues before this Court.

The issue before the Court is one of constitutional origin, namely due process. While the Wisconsin Employment Relations Commission may concern itself with due process on occasion, it does so in a collateral fashion. However, I do not want to indicate that the Wisconsin Employment Relations Commission does not have jurisdiction in other areas of this particular labor dispute.

As to the principle citations called to the Court's attention by counsel for the defendants the Seebruch case reported in 74 L.R.R.M. 2988, and the Lewis case, Columbia County case number 12456 it must be pointed out, Gentlemen, that each of those cases involved either an alleged unfair labor practice (Lewis) or an alleged prohibited practice (Seebruch). Such is not the case in this situation.

Accordingly, the Court having deemed the limited issue in this case to be one of constitutional due process rights, I specifically find that this Court has jurisdiction to hear the request for injunctive relief.

As to the second issue, whether injunctive relief should

be granted, this Court must indeed, as invited by plaintiff's counsel, look at substance rather than form. The substance of this matter is and I specifically find:

(1) The plaintiffs and members of their class are teachers who signed individual 1973-74 contracts with the Hortonville Joint School District No. 1.

(2) The 1973-74 individual contracts incorporated by reference the 1972-73 school year master collective bargaining agreement.

(3) The plaintiffs and members of their class have engaged in a strike against the Hortonville Joint School District No. 1 since March 8, 1974, and up to the present.

(4) Each of the plaintiffs and members of their class received notices of termination of their employment as teachers for the aforesaid school district, effective April 2, 1974.

Now I want to clarify that so there is no misunderstanding. I am not finding whether or not those terminations are valid or invalid. I am making no such judgment.

The thrust of the plaintiffs' position has been throughout these proceedings that they are on strike with justification. That such justification is in brief a conspiracy by the defendants to fire certain of the plaintiffs and members of their class by utilizing methods which were calculated to provoke the present strike. Such a strike, as viewed by the plaintiffs, would enable the defendants to hire at random from the ranks once the strike had begun and once their employment was terminated.

This Court has taken the position that the reasons for

the strike as well as the reasons for the alleged discharge are not relevant to the scope of this proceeding. This Court has, therefore, so limited the presentation of evidence in those respects.

Counsel for the plaintiffs has cited a number of cases holding that certain strikes are justifiable in spite of existing collective bargaining agreements which provide to the contrary. Those cases, however, are not applicable to the public sector in the State of Wisconsin. The law in Wisconsin on this point is clear and succinct as set forth in Wisconsin Statute 111.70 (4) (1) and I quote: "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited.

That statute does not say nor has any Court in this state interpreted that statute to provide that strikes are expressly prohibited except when there is just cause. The legislative policy on this point is clear. Section 111.01(4) of the Wisconsin Statutes provides: "It is the policy of this state in order to preserve and promote the interests of the public, the employe, and the employer, alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

It is the further argument of the plaintiffs that the chain of cause and effect in this case is substantially as follows: That the defendants committed certain acts; those acts of defendants caused the strike: the strike caused the discharge and termination of employment notices to be sent on April 2nd, 1974. But, as I previously indicated, Wisconsin law does not give validity to the provocation-justified strike theory. Therefore, one must look to the strike, the termination of the employment notices chain of cause and effect.

Although the case of David Adler and Sons Company vs. Maglio, 200 Wisconsin 153 is prior to recent deve'opments and statutes in the area of labor law, the principles of that case are equitable in nature and they hold true today as they did back in 1921. The Court said in part in that case on page 159: ". . . the portals of equity are closed to those who come seeking relief from the consequences which naturally flow from deliberate wrongs committed by the applicant for relief. 'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever use he may make of them in a court of law, he will be held remediless in a court of equity.' "

There is ample testimony in the record that the plaintiffs discussed the possible consequences of their strike, one of those consequences being potential termination of their employment.

This Court can only conclude that the plaintiffs have deliberately caused their present predicament and that therefore, they stand before this Court this evening with what is legally termed "unclean hands".

As to the showing of possible success by the plaintiffs in the underlying lawsuit, let it suffice to say that if that was the only issue to be considered in granting injunctive relief, this Court would not deny such relief.

However, the possible success of ultimately prevailing is not the sole consideration. The second consideration is whether irreparable damage will be sustained by the plaintiffs as a result of any of the defendants' acts.

Irreparable damage means damage which either cannot be corrected at a future date or if corrected at a future date it will be too late to accomplish justice. In essence, irreparable damage is that for which no adequate remedy can be found to rectify.

The evidence in this case has proved that each of the plaintiffs who tesified are suffering and will continue to suffer economic loss as a result of the termination notices which were sent to them April 2, 1974. Surely the job market for teachers at this time of the year is poor and there is obviously little hope that the picture will be better in the near future. But the fact remains that between March 18 and at least until April 2, 1974, the plaintiffs deliberately chose to sustain such economic loss, as well as any resulting consequences. When the testimony closed this afternoon it was apparent that the strike still continues. The plaintiffs still choose by their own doing a route that is obviously causing economic loss, economic hardship. This, however, is not like a garnishment action which was mentioned in the course of argument. In a garnishment action the debtor is deprived of his property as the result of a sudden seizure of his property, a decision in which he has no choice. The same cannot be said here. The plaintiffs had a choice and they have made it.

The Court is also of the opinion that in spite of the temporary economic loss, temporary economic hardships the plaintiffs do have adequate remedies by which they may refer such financial losses if they prevail in any

of those remedies. There is a grievance procedure available under their contract for the 1973-74 school year. There are possible procedures before the Wisconsin Employment Relations Commission. There are possible suits for breach of contract, and there is already the underlying lawsuit in this case.

While the decision is difficult for the Court to make, as much as the Court can sympathize with the plaintiffs as well as the defendants in this most difficult decision, the Court must and does hereby for the reasons afore stated deny the plaintiffs application for a temporary injunction.

Counsel for the defendants are directed to draft an appropriate order to that effect within five days, the same to be furnished to counsel for the plaintiffs for approval as to form.

Thank you, we stand adjourned. (6:59 p.m.)

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER DENYING APPLICATION FOR TEMPORARY INJUNCTION

The captioned matter having come on for hearing on the Plaintiff's application for temporary injunctive relief to be effective pending final disposition of this action; and hearing thereon having been held on April 9, 10 and 11, 1974; and thereafter the Court having heard oral arguments of both parties; and the Court having made Findings of Fact and Conclusions of Law;

NOW THEREFORE, IT IS ORDERED, that Plaintiff's application for a temporary injunction be, and the same is hereby, DENIED.

Dated this 23rd day of April, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Circuit Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ANSWER

COME NOW The defendants named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., and as and for an Answer to the Complaint herein, admit, deny and allege as follows:

1. Deny information sufficient to form a belief as to the truth of the allegations of paragraph 1 and 2 of the Complaint and puts plaintiffs to their proof thereof.

2. As to paragraph 3, Defendants admit the material allegations except Defendants deny that the offices of the District or the Board or the Superintendent or Gene Riedl are located at 211 East Union Street, Hortonville, Wisconsin, and allege that such offices are located at 246 North Olk Street, Hortonville, Wisconsin; deny

that Merlin Plamann resides at 4510 North McArthy Road, Appleton, Wisconsin; and allege that Merlin Plamann resides at 4510 North McCarthy Road, Appleton, Wisconsin;

3. As to paragraph 4, Defendants allege that on March 18, 1974, the named plaintiffs and all but two of the employees then employed by the District and represented by the Hortonville Education Association, engaged in a strike against the District contrary to prohibition thereof in sec. 111.70 (4) (L), Wisconsin Statutes; deny that all teachers represented by the Association were served notices of scheduled hearings; allege that such notices were served on and hearings scheduled for only those individuals who engaged in the unlawful strike activity; deny that the timing of said notices denied the plaintiffs or others who received similar notices a fair opportunity to consult with an attorney or to prepare a defense.

4. Answering paragraph 5, Defendants deny that at the beginning of the appearances before the Board the plaintiffs and other teachers requested opportunity to examine adversary management personnel relative to the charges against them.

5. As to paragraph 7, Defendants allege that each officer of the Association was informed of his or her hearing scheduled before the Board; deny that the allegations of paragraph 7 are relevant to any issue or matter over which the Court has jurisdiction; upon information and belief, deny that the Association represented the individual named plaintiffs or other teachers in the scheduled hearings before the Board.

6. As to paragraph 8, deny it was the intention of

the Board or its administrators or agents to hire permanent replacements for all discharged teachers represented by the Association; admit that the Board and its administrators and agents have taken steps to recruit and hire, and have in fact done so, teaching personnel necessary for the conduct of Defendants statutory obligations.

7. Deny each and every allegation of paragraphs 9 and 10.

8. Deny information sufficient to form a belief as to the truth of the allegations of paragraph 11, except defendants admit that documents purporting to be grievances have been filed with the Board by each discharged and not rehired teacher.

9. Deny each and every material allegation of paragraph 12.

AFFIRMATIVE DEFENSES

And further answering the Complaint, Defendants allege as affirmative defenses:

10. That each named plaintiff and other teachers represented thereby quit his or her employment by engaging in an unlawful strike on March 18, 1974.

11. That plaintiffs and all members of the class represented by plaintiffs waived any "due process" rights they had or may have had to and in the hearings scheduled by the Defendant Board of Education, in that:

a. Said persons quit their employment and were not entitled to any pre-termination hearing;

b. Said persons were not entitled, under any "due

process" provision or otherwise, to a full hearing with and by the Board of Education prior to notification of action terminating employment status;

c. Said persons refused to answer questions which the Board sought to ask to ascertain whether alleged unlawful unprotected activity was engaged in and if so, whether there existed circumstances for Board consideration in respect thereto;

d. Said persons, through counsel, did not request additional time for preparation of "defense," and agreed to proceed with said matters on April 1, 1974.

12. That the Court lacks jurisdiction over the subject matter of the Complaint.

WHEREFORE, Defendants pray that this Court enter judgment dismissing the Complaint and for their costs and disbursements.

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants

[Verifications omitted in printing]

STATE OF WISCONSIN IN CIRCUIT COURT
OUTAGAMIE COUNTY

[Caption omitted in printing]

PRE-TRIAL ORDER

Whereas the above captioned matter came on for pretrial on May 31, 1974, and the plaintiffs having orally requested pursuant to Section 269.44 of the Wisconsin Statutes leave of the Court to file an amended complaint,

and the defendant having orally requested pursuant to Section 269.45 of the Wisconsin Statutes an extension of time within which to move for summary judgment,

Now, Therefore, on the Court's own motion

IT IS HEREBY ORDERED that the plaintiffs be and hereby are granted leave to file an amended complaint in the above captioned matter within five days from the date of this order.

IT IS FURTHER ORDERED that the time for moving for summary judgment be and is hereby extended until the expiration of twelve days after the signing of this order.

IT IS FURTHER ORDERED that in the event this matter must be tried, trial shall commence on Monday, July 15, 1974, unless counsel shall have timely moved for a delay in the commencement of trial.

Dated this 3rd Day of June, 1974

BY THE COURT

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AMENDED COMPLAINT

COME NOW the plaintiffs above-named, by their attorneys, Lawton & Cates, and as and for causes of action

against the above-named defendants, hereby amend the original complaint and allege and show to the Court as follows:

PARTIES

1. Plaintiff, Hortonville Education Association (hereinafter "Association"), is a labor organization as defined by Section 111.70(1)(j) of the Wisconsin Statutes. It is the collective bargaining representative of all teachers employed by the Hortonville Joint School District No. 1. Michael Wisnoski is the President of the Association.

Plaintiff Michael Wisnoski is a public school teacher. He resides with his wife and three (3) children at Route 1, North Road, Appleton, Wisconsin. At all times material hereto he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1, and he has been the President of the Association.

Plaintiff Rose Marie Olson is a public school teacher. She resides with her husband and two (2) chidren at 509 West Cedar Street, Hortonville, Wisconsin. At all times material hereto, she has been employed as a teacher by the Hortonville Joint School District No. 1.

Plaintiff Thomas Nadeau is a public school teacher. He resides with his wife and children at Route 1, Grandview Road, Hortonville, Wisconsin. At all times material hereto, he has been employed as a high school teacher by the Hortonville Joint School District No. 1.

Plaintiff Judy Murphy is a public school teacher. She resides with her children at 728 Chestnut Street, Neenah, Wisconsin. At all times material hereto, she has been employed as a guidance counselor by the Hortonville Joint School District No. 1.

Plaintiff Russel Lichte is a public school teacher. He resides with his wife at 2300 Woodrow Court, Appleton, Wisconsin. At all times material hereto he has been employed as a high school, junior high school, and elementary school teacher by the Hortonville Joint School District No. 1.

Plaintiff Ronald Hammond is a public school teacher. He resides with his three children at 518 Whitney Street, Kaukauna, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1.

2. The plaintiffs individually named in paragraph 1 of this Complaint are representative of all teachers employed by the District whose employments the Board has acted to terminate. Said plaintiffs represent all other Hortonville teachers so situated, and the issues set forth in this Complaint are of common interest to all teachers in said class. Said class of teachers is too numerous, and it is impractical, to bring all of them before this Court. The named plaintiffs fairly and fully will represent all of the interests of all other teachers situated similary to the individually-named plaintiffs.

3. Defendant Hortonville Joint School District No. 1 (hereinafter "District") is a public school district organized under the laws of the State of Wisconsin. The District is a municipal employer as defined at Section 111.70(1)(2), of the Wisconsin Statutes. It has its offices at 246 North Olk Street, Hortonville, Wisconsin. Defendant Board of Education of the District (hereinafter "Board") is a public body charged under Wisconsin law with the management of the District. It has its offices at 246 North Olk

Street, Hortonville, Wisconsin. The duly-elected and acting President of the Board is Roger Weihing, who resides at Route 1, Appleton, Wisconsin.

Defendant Marvin Obry is the Superintendent of the District and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin. Defendant Robert Kohls is the Hortonville High School Principal and agent of the Board. He has his office at 246 North Olk Street, Hortonville, Wisconsin. Defendant Eugene Riedl is the Hortonville Junior High School and Elementary Schools Principal and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin.

The remaining individually-named defendants all are members of the Board. Robert Hauk, the Clerk of the Board, resides at 111 East Cedar Street, Hortonville, Wisconsin. Jean Meads resides at Route 1, Hortonville, Wisconsin. Floyd Meyer resides at Route 2, Appleton, Wisconsin. Merlin Plamann resides at 4510 North McCarthy Road, Appleton, Wisconsin. Victor Schroth resides at Route 1, Hortonville, Wisconsin. Ronald Suprise resides at Route 2, Hortonville, Wisconsin.

FIRST CAUSE OF ACTION

As and for a first cause of action, plaintiffs allege and show to the Court as follows:

4. The allegations set forth in this amended complaint, paragraphs 1 through 3, are hereby incorporated by reference to have the same force and effect as though here fully set forth.

5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1974, the indi-

vidually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment.

6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to prevent evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs.

No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board.

7. By letters dated April 2, 1974, the plaintiffs and on information and belief, almost all other teachers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year.

8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2 and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association.

9. The aforesaid acts of the Board, set forth at paragraphs 5, 6, 7 and 8 herein, done by the Board and their administrators and agents, all have been done under color of state law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith. The named defendants, have done said acts acting individually and as part of conspiracy to deny the plaintiffs and others similarly situated their rights to procedural due process of law as guaranteed

under the Fourteenth Amendment to the United States Constitution and Article I of the Wisconsin Constitution. Said acts by the Board and their administrators and agents have been done for the purpose of and have resulted in the plaintiffs and other teachers similarly situated being denied employment with the District. The Board's actions, and the actions of its administrators and agents, have denied to the plaintiffs and others similarly situated the liberty and property interests secured to them under the United States Constitution, and have caused substantial injury to the plaintiffs and others similarly situated in their personal and professional reputations and their abilities to secure employment in their teaching profession. The actions of the Board and its administrators and agents have caused the plaintiffs, and other similarly situated, great emotional upset and distress, and have caused them to incur financial losses.

10. The actions of the Board and its administrators and agents, which are set forth at paragraphs 5, 6, 7, 8 and 9 herein, and each and every one of said actions both separately and in toto, have denied to the plaintiffs, and other teachers similarly situated, procedural due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution and Article I of the Wisconsin Constitution. The actions of the Board, and its administrators and agents, to date, have continued to deny to the plaintiffs and others similarly situated the rights secured to them under the Constitutions of the United States and of Wisconsin, all to the irreparable harm of the plaintiffs and others similarly situated.

SECOND CAUSE OF ACTION

As and for a second cause of action, the plaintiffs allege and show to the Court as follows:

11. The alleagations set forth in paragraphs 1 through 8 herein, hereby are incorporated by reference to have the same force and effect as if fully set forth at this point.

12. Certain teachers who appeared before the Board without representation by the Association, have been treated differently from the employees who appeared before the Board represented by the Association. Said teachers who appeared before the Board without representation were offered employment opportunities and conditions of employment not offered to the teachers who were represented by the Association before the Board.

13. The conduct of the Board, its administrators and agents, which is set forth at paragraph 12 herein, constitutes a disparate and discriminatory treatment of the teachers who appeared before the Board. Said conduct by the Board, its administrators and agents, constitutes a violation of the equal protection of the law requirements of the Fourteenth Amendment to the United States Constitution and of the Wisconsin Consitution.

THIRD CAUSE OF ACTION

As and for a third cause of action, the plaintiffs allege and show to the Court as follows:

14. The allegations set forth in paragraphs 1 through 8 of this Amended Complaint hereby are incorporated by reference to have the same force and effect as if fully set forth at this point.

15. On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public.

16. The aforesaid special meeting held on April 2, 1974, at which the plaintiffs and other similarly situated were deprived of liberty and property interests in their continued employments, was a closed meeting and in violation of Section 66.77, Wis. Stat. The actions taken by the Board, its administrators and agents, against the plaintiffs and other teachers similarly situated at the unlawful closed meeting are null and void, and in violation of the statutes of Wisconsin.

FOURTH CAUSE OF ACTION

As and for a fourth cause of action, the plaintiffs allege and show to the Court as follows:

17. The allegations set forth in paragraphs 1 through 3 of this Amended Complaint hereby are incorporated by reference to have the same force and effect as if fully set forth herein.

18. On information and belief, the Board, its administrators and agents, have hired, and are hiring permanent replacement for the plaintiffs and other teachers similarly situated, for both the 1973-1974 and 1974-1975 school years. It is the intention of the Board, its administrators and agents to hire permanent replacements for all plaintiffs and others similarly situated.

19. On information and belief, said permanent replacements have been hired, and are being hired, in violation of Sections 118.19, 118.21 and 118.25, Wis. Stat. Said hirings, and the teaching contracts entered into between the Board and the permanent replacements, are in violation of the Wisconsin Statutes, and they are null and void.

WHEREFORE, it is prayed that this Circuit Court enter its order granting judgment for the plaintiffs and others similarly situated:

A. Declaring the aforesaid actions of the Board, its administrators and its agents, to be a denial of constitutionally-secured due process of law, and null and void;

B. Ordering that the discharge of the plaintiffs, and other teachers similarly situated, be set aside, and declared null and void;

C. Enjoining the defendants from recruiting and hiring permanent replacements for the plaintiffs and others similarly situated, until such time as the plaintiffs and others who are similarly situated have been afforded a full and fair hearing that meets the requirements of constitutionally-secured due process of law, concerning their discharges;

D. Ordering the defendants to rescind and revoke any contracts they have made for the premanent replacement of any of the plaintiffs, or any others similarly situated;

E. Ordering the parties mutually to agree upon and select an impartial decision-maker to determine if there was "just cause" for the termination of each of the plaintiffs and other teachers similarly situated.

F. Granting such other and further relief as may be appropriate.

Dated: May 30, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
Attorney for Plaintiffs

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

ANSWER TO FIRST CAUSE OF ACTION IN AMENDED COMPLAINT AND DEMURRER TO STATED SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION AND FOURTH CAUSE OF ACTION

ANSWER TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT

COME NOW THE DEFENDANTS named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., and as and for an Answer to First Cause of Action in Amended Complaint herein, admit, deny and allege as follows:

1. Deny that plaintiff Hortonville Education Association is a labor organization as defined by Section 111.70 (1) (j), Wisconsin Statutes; deny that Hortonville Education Association is the collective bargaining representative of all teachers employed by defendant Hortonville Joint School District No. 1; deny that any or all of the individual

named plaintiffs, Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond have, at all times material, been employed as teachers by the Hortonville Joint School District No. 1; and Defendants deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1 and of paragraph 2 of the Amended Complaint, and puts plaintiffs to their proof thereof.

2. As to paragraph 3 of the Amended Complaint, Defendants admit the material allegations except Defendants deny that the offices of Superintendent Marvin Obry or principal Gene Reidl are located at 211 East Union Street, and allege that such offices are located at 246 North Olk Street, Hortonville, Wisconsin.

3. As to paragraph 4 of the Amended Complaint, Defendants reallege paragraphs 1 and 2 of this Answer.

4. As to paragraph 5 of the Amended Complaint, Defendants deny that all teachers represented by the Association were served with notice of hearing; allege that on March 18, 1974, the named plaintiffs and all other teachers then employed by the District, and for whom the Hortonville Education Association had been the collective bargaining representative, engaged in a strike against the District contrary to prohibition thereof in sec. 111.-70(4)(1), Wisconsin Statutes, and in breach of their individual teaching contracts for the 1973-74 school year; allege that two (2) of said teachers returned to the District's classrooms on Friday, March 22, 1974 and said teachers have continuously since that date remained in the District's employ, and were not served with notice of hearing; deny that the notices served on the individual striking

employees notified such employees that the Board was considering taking action against their then current teaching contracts; allege that such notices advised the individual striking employees that the alleged conduct therein set forth, if true, subjected such employee to disciplinary action by the Board, including possible termination of employment contract, and further advised such employees that after the hearing thereby scheduled, the Board would notify the employee of what disciplinary action, if any, the Board had determined appropriate; deny that said notices denied plaintiffs, and others who received such notice, a fair opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment.

5. As to paragraph 6 of the Amended Complaint, Defendants deny that plaintiffs and other teachers at any time on April 1, 1974 requested the opportunity to examine adversary management personnel relative to the charges against plaintiffs and other teachers; allege that plaintiffs' counsel stated that plaintiffs wished to present evidence regarding the bargaining between the parties and had some questions of some of the Board members; deny that all of the objections and requests made by the plaintiffs and other teachers were denied by the Board; allege that through counsel plaintiffs and other teachers admitted the conduct alleged in the notice of hearing served individually upon each of them; allege that the matters set forth by counsel for the individual teachers in an offer of proof made at said hearing, if true, was no justification for, and was immaterial to a consideration of the conduct engaged in by plaintiffs and the other teachers represented by plaintiffs in this action.

6. As to paragraph 7, Defendants deny information or knowledge sufficient to form a belief as to whether the plaintiffs and other teachers had signed contracts for the 1974-75 school year on or before April 2, 1974, and puts the plaintiffs to their proof thereof; allege that by letter dated April 2, 1974, the Board of Education notified each teacher that the Board has terminated his/her 1973-74 employment contract with the Hortonville district effective immediately, which action included withdrawal of the offer of employment for the 1974-75 school year and/or termination of such tendered employment contract; allege that said letter of April 2, 1974 advised each such teacher that he/she had been found guilty of the conduct set forth in the notice of hearing, as admitted by counsel for the plaintiffs and other teachers at the hearing on April 1, 1974.

7. As to paragraph 8, Defendants deny that the Hortonville Education Association represents the plaintiffs and all other teachers employed by the District; deny that the Hortonville Education Association was not informed of the hearings scheduled by and before the Board; allege that each officer of the Association was informed of his or her hearing scheduled before the Board; upon information and belief, deny that the Association represented the plaintiffs or other teachers at the time of or in the hearings scheduled before the Board of Education; allege that it is not possible for the Board to give notification of a decision prior to its making a decision.

8. Defendants deny each and every material allegation contained in paragraphs 9 and 10.

DEMURRER TO THE SECOND CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Second Cause of Action on the ground that the stated Second Cause of Action in the Amended Complaint does not state facts sufficient to constitute a cause of action.

DEMURRER TO THE THIRD CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Third Cause of Action on the ground that the stated Third Cause of Action in the Amended Complaint does not state facts sufficient to constitute a cause of action.

DEMURRER TO THE FOURTH CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Fourth Cause of Action on the grounds that there is a defect of parties defendant in that the parties to such contracts are not parties to this lawsuit; and that the stated Fourth Cause of Action in the Amended complaint does not state facts sufficient to constitute a cause of action.

AFFIRMATIVE DEFENSES

And further answering the First Cause of Action in the Amended Complaint, Defendants allege as affirmative defenses:

1. That each plaintiff and other teachers represented thereby quit his or her employment by engaging in an unlawful strike on March 18, 1974.

2. That plaintiffs and all members of the class represented by plaintiffs waived any due process rights they had or may have had to and in the hearings scheduled by the Defendant Board of Education, in that:

a. Said persons quit their employment and were not entitled to any pre-termination hearing;

b. Said persons were not entitled, under any "due process" provision or otherwise, to a hearing with and by the Board of Education prior to notification of action terminating employment status;

c. Said persons refused to answer questions which the Board sought to ask to ascertain whether alleged unlawful unprotected activity was engaged in and if so, whether there existed relevant circumstances for Board consideration in respect thereto;

d. Said persons, through counsel, did not request additional time for preparation and agreed to proceed with said matters on April 1, 1974.

3. That the Hortonville Education Association is not a proper party plaintiff to the action.

WHEREFORE, Defendants pray that this Court enter judgment dismissing the Amended Complaint and for their costs and disbursements.

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants
By: /s/ JAMES K. RUHLY
119 Monona Avenue
Madison, Wisconsin 53703

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF MOTION

TO: MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys For Defendants

PLEASE TAKE NOTICE that Plaintiffs, by their attorneys, LAWTON & CATES, will move the Court on the 27th day of June, 1974, at the Outagamie County Court House, before the Honorable Allen J. Deehr, at 3:00 o'clock P.M., or as soon thereafter as counsel can be heard for an order overruling Defendants' Demurrers.

Dated at Madison, Wisconsin, this 21st day of June, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Plaintiffs

[Caption omitted in printing]

MOTION

TO: MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys For Defendants

COME NOW the Plaintiffs, by their attorneys, LAWTON & CATES, and move the Court for an order overruling Defendants' Demurrers; said Motion to be heard at the time and place indicated in the attached Notice.

Dated: June 21, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
110 East Main Street
Madison, Wisconsin 53703
Attorneys For Plaintiffs

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO: LAWTON & CATES
Attorneys for Plaintiffs
110 East Main Street
Madison, Wisconsin 53703
Attention: Bruce Ehlke, Esq.

PLEASE TAKE NOTICE That the undersigned as attorney for the defendants in the above entitled action, hereby moves said court for summary judgment in favor of defendants and against the plaintiffs, dismissing the Amended Complaint, and for costs and disbursements of this action. Such motion will be heard on the 27th day of June, 1974, at 3:00 o'clock P.M., or as soon thereafter as counsel can be heard, and at the courtroom of the court above named in the City of Appleton. Said motion is based on the Amended Complaint, Answer and the record in this

action, and the affidavit of Roger Weihing, a true and correct copy of which is attached hereto.

Dated this 12th day of June, 1974.

/s/ JACK D. WALKER
MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys for Defendant

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN

ss.

COUNTY OF OUTAGAMIE

Roger Weihing, being first duly sworn, on oath deposes and says:

1. That he is an adult resident of Outagamie County, State of Wisconsin, residing at Route 1, Appleton, Wisconsin; that he is now, and has been since April, 1969, a member of the Board of Education for Hortonville Joint School District No. 1, Village of Hortonville, et al.; that he is now, and has been since January, 1973, president of said Board of Education.

2. That commencing Monday, March 18, 1974, the teaching employees then employed by said school district

engaged in an unlawful strike against the defendant school district; that said strike began after agreement had been reached between the parties on the terms for a collective bargaining agreement for the 1973-74 school year, and prior to completion of negotiations for a collective bargaining agreement for the 1974-75 school year, to commence in late August, 1974.

3. That prior to commencement of said unlawful strike, and commencing on or about January 24th, 1974, the teaching employees then employed by said school district engaged in a "mini-strike" against said school district; that said mini-strike consisted of said teaching employees engaging in informational picketing prior to the commencement of the school day, and a refusal to perform assigned, contracted responsibilities after 4:00 P.M. on school days; that said mini-strike terminated on or about January 30, 1974, and thereafter agreement was reached on the terms for a 1973-74 collective bargaining agreement.

4. That on March 20, 1974, after commencement of the unlawful strike, the school district superintendent, Marvin Obry, at the direction of the Board of Education, informed each teacher by letter that the school board was proceeding with plans to get the children back in the schools; said letter invited the teacher employees then on strike to be a part of said plans; that thereafter several of the teaching employees then on strike returned to the school on Friday, March 22, 1974.

5. That on March 23, 1974, said school district superintendent, at the direction of the Board of Education, informed each teacher by letter that teachers who desired to

resume work were invited to contact the superintendent's office during regular working hours; that none of the 86 teaching employees then on strike contacted the superintendent's office thereafter; that said letter also reminded the teachers that strikes by public employees, including teachers, were expressly prohibited by Wisconsin law, and that the school board "can not and will not condone unlawful activity" by its employees; and that a copy of said letter is attached hereto as Exhibit "A" and is incorporated herein as though set forth in full herein.

6. That following two in-service training days on Friday, March 22, 1974, and Monday, March 25, 1974, the school district conducted classes for most of the students in the district on Tuesday, March 26, 1974, and Wednesday, March 27, 1974, with the use of substitute teachers; that plans to conduct school on Thursday, March 28, 1974, had to be called off because of inclement weather.

7. That a special board meeting was held on Thursday morning, March 28, 1974, attended by and consented to by all board members; that at said meeting the board of education determined that other alternative avenues of operating the schools in the district would be further explored in order that the schools in the district be returned to normal as soon as possible.

8. That a special school board meeting was held on Friday, March 29, 1974, attended by and consented to by all board members; that also present was attorney James K. Ruhly, of the Melli, Shiels, Walker & Pease, S.C., law firm of Madison, Wisconsin; that at said meeting it was determined to schedule disciplinary hearings for each individual teacher who had been and was then engaged in the unlawful work stoppage, commencing at 9:00

o'clock in the forenoon on Monday, April 1, 1974; that notices of such scheduled individual teacher hearings addressed to each such individual teacher were prepared by the school administration at the direction of the School Board; and that a copy of such notice is attached hereto and marked as Exhibit "B".

9. That said notices were delivered by the Board of Education and its agents to the Outagamie County Sheriff's Department on Friday, March 29, 1974 with a request that service of same be made that day or as soon thereafter as the Sheriff's Department would be able to serve same; that attached hereto and marked Exhibit "C" is a compilation of the date that said notices were served on each individual teacher, and the date that the hearing for said teacher was scheduled by the Board of Education.

10. That at 9:00 o'clock in the forenoon on April 1, 1974, the Board of Education convened in the High School library to begin the scheduled individual disciplinary hearings; that at said time, Mr. Donald Dickinson, a professional negotiator and field consultant employed by the Wisconsin Education Association Council, the state organization with which the Hortonville Education Association is affiliated, informed the Board of Education that the individual teacher scheduled for a hearing at 9:00 A.M. on April 1, 1974, was not prepared to proceed because said teacher's legal counsel, Mr. Bruce Ehlke, was not then present in the hearing room; that the individual teacher scheduled for a hearing at 9:00 A.M. that date, was John Amburgy; that at 9:20 A.M. on April 1, 1974, the individual teacher scheduled for a hearing at that time likewise advised the Board that he was not prepared to proceed because his legal counsel, Mr. Bruce Ehlke, had

not yet arrived at the hearing room; that the individual teacher scheduled for a hearing at 9:20 A.M. that date was James Olson; that at 9:40 A.M. on April 1, 1974, the individual teacher scheduled for a hearing at that time advised the Board that he was not prepared to proceed because his legal counsel, Mr. Bruce Ehlke, had not yet arrived at the hearing room; that the individual teacher scheduled for a hearing at 9:40 A.M. that date was Russell Hildebrand; that in each of the foregoing situations the Board of Education postponed further proceedings because of the individual teacher's request to not proceed until Attorney Ehlke arrived; that Attorney Bruce Ehlke arrived at the hearing room at approximately 9:45 A.M. on April 1, 1974; that thereafter the Board of Education attempted to conduct individual hearings for the teachers scheduled for hearings that day; that all teachers scheduled for hearings on Monday, April 1, 1974, were present at the hearing room that day through the termination of the proceedings as hereinafter set forth; that all but five of the teachers scheduled for hearings on April 2 and 3, 1974, were also present in the hearing room on April 1, 1974, at all material times; that in the presence of said teachers, Attorney Bruce Ehlke represented to the Board of Education that the individual teachers would not respond to questions asked of them by the Board of Education and its agents including its counsel, James Ruhly; that Attorney Ehlke asserted to the Board of Education that the individual teachers scheduled for hearings on Monday, April 1, 1974, had not received sufficient notice of the hearings and were therefore not able to prepare a defense; that the Board of Education, through counsel, on several occasions during the proceedings on Monday,

April 1st, 1974, requested that Mr. Ehlke be more specific in terms of the amount of time that his clients requested in order to prepare a defense to the allegations contained in the individual notice of hearing; that Attorney Ehlke failed and refused to respond to Board counsel's request; that Attorney Ehlke on several occasions requested that the Board adjourn the hearings to permit him to discuss various matters with his clients and each such request was granted by the Board of Education and no further proceedings were held until Mr. Ehlke informed the Board that he and his clients were ready to resume; that Attorney Ehlke stated that all teachers to that time and date served with individual notice of hearing were prepared to proceed that day but said teachers would not respond to questions asked by the Board but would rely upon said Hortonville Education Association to respond on their behalf.

11. That at no time during said proceedings did Attorney Ehlke, or any of the teachers present in the hearing room deny the alleged conduct set forth in the individual notices theretofore served upon the individual teachers; that Attorney Ehlke stated that the factual circumstances present in this matter were as much within the Board's knowledge as within the teachers' knowledge; that Attorney Ehlke stated that each of the individual teachers who had been served with notice of hearing had engaged in the same conduct, and therefore individual hearings were not necessary; that Attorney Ehlke stated that his clients did not wish to have the hearings set for a reconvened or future date; that Attorney Ehlke advised the Board that his clients understood, after consultation with him, that if they refused to answer questions, the Board

could conclude they were engaged in a strike; that Attorney Ehlke asserted to the Board that the defense which the Hortonville Education Association proposed to demonstrate to the Board, by calling some of the Board members individually and asking questions of them, was that the unlawful collective action engaged in by the teachers since March 18, 1974, had been provoked by the Board of Education; the Board of Education, on the advice of its counsel, refused to hear said evidence, but did permit Attorney Ehlke to make an offer of proof which Attorney Ehlke thereafter did.

12. A complete copy of the transcript prepared by a stenographic reporter present at the proceedings on April 1, 1974 has been admitted into evidence in this proceeding as Exhibit No. 7 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

13. That thereafter, on Monday afternoon, April 1, 1974, one of the teachers served with Notice of Hearing, Ms. Tonia Stamborski, who had not appeared on the morning of April 1, 1974, contacted a member of the Board of Education via the telephone and requested that her hearing be scheduled for that day instead of April 2, 1974 the day scheduled by the Board of Education; that the Board of Education consented to the rescheduling of said hearing as requested by said teacher; that thereafter said teacher appeared before the Board of Education on Monday afternoon, April 1, 1974, and had her hearing on the conduct alleged in the notice of hearing; that a complete transcript of said hearing prepared by a stenographic reporter present at said hearing has been admitted into evidence in this proceeding as Exhibit No. 9 in the hearing

for temporary injunctive relief held on April 9, 10, and 11, 1974, before the Honorable Allan J. Deehr.

14. That on Tuesday, April 2nd, 1974, pursuant to agreements made between Board counsel James Ruhly and Attorney Bruce Ehlke, hearings were held by the Board of Education for four teachers who had been served with notice of hearing since Monday morning, April 1, 1974; that said four teachers appeared for their hearings by their counsel, Attorney Bruce Ehlke; that Attorney Ehlke stated to the Board of Education that said four teachers were ready to proceed with their hearing, but they did not wish to have individual hearings, that they wished that their employment "be considered in the same boat as all other employees"; that said teachers did not wish to have a separate hearing with the Board of Education; that said teachers would refuse to answer questions asked of them as had the teachers on the previous day; and that a true and correct copy of the transcript of said proceedings prepared by a stenographic reporter present at said hearing has been previously admitted into evidence in this proceeding as Exhibit 10 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

15. That on Tuesday afternoon, April 2, 1974, the Board of Education held a special meeting, all members present and consenting thereto, at which meeting the Board unanimously adopted a resolution terminating the employment of all striking teachers who had not either returned to the schools on March 22, 1974, or had not indicated that they would return to the building and terminate their participation in the unlawful strike against the school district; that said resolution further directed that a

letter of reprimand be sent to, and a copy placed in the personnel file of, Tonia Stamborski; that said resolution further directed that notice of termination of employment be sent to those teachers whose employment had been terminated by the Board of Education; that by said resolution the Board of Education also revoked and/or terminated the offer of employment previously proffered, on or about March 15, 1974, to the individual teachers prior to commencement of the strike action; that a true and correct copy of such resolution, and of the minutes of said board meeting, has been admitted into evidence in this proceeding as Exhibit 12 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

16. That pursuant to the resolution described in the paragraph number 15, notice of termination of employment for the remainder of the 1973-74 school year and withdrawal of the offer of employment for the 1974-75 school term and/or termination of such tendered contract, was sent, certified mail, return receipt requested, to each terminated employee; that such notice advised each individual terminated teacher that he or she could apply for further employment with the District if such further employment was desired; that only one such employee, Mr. Thomas Belaire, so applied prior to April 8, 1974; that a copy of the notice of termination sent to each terminated employee has been admitted into evidence in this proceeding as Exhibit 2 in the hearing for temporary injunctive relief before the Honorable Allan J. Deehr.

17. That on April 5, 1974, the Board of Education held a hearing for a teacher who erroneously had been

omitted from the list of striking teachers, to wit: Ms. Margaret Powers; that Ms. Powers appeared at said scheduled hearing with counsel, Attorney Bruce Ehlke; that Attorney Ehlke asserted that Ms. Powers wished to take the same position as previously taken by other striking teachers (except Tonia Stamborski) as stated above; that a transcript of said proceeding was taken but affiant is without knowledge as to whether said transcript has been prepared by the reporter present at that hearing; that at the conclusion of said hearing, the Board of Education held a special meeting, all members present and consenting thereto, and voted unanimously to terminate the employment of Margaret Powers; and that notice of such action was thereafter sent at the Board's direction to said Margaret Powers.

18. That on April 6, 1974, the Board of Education held a special meeting, all members present and consenting thereto, at which meeting the Board of Education voted to hire replacement teachers recommended by the administration to the Board of Education; that contracts were issued to said replacement teachers at the conclusion of the school day on Monday, April 8, 1974, and said contracts were signed by the Board of Education at a special meeting, all members present and consenting thereto, held on Monday evening, April 8, 1974.

19. That the contracts for several replacement teachers not returned by said replacement teachers on April 8, 1974 and therefore not signed by the Board that date, were signed by the Board of Education at a special board meeting, all members present and consenting thereto, on April 15, 1974, and at the Board's regularly scheduled meeting on May 13, 1974.

20. That the schools reopened on April 8, 1974; that classes since that date have been conducted by replacement teachers hired by the Board of Education; that the two teachers who returned to work on March 22, 1974, continued in the District's employ; that Tonia Stamborski returned to the classroom on April 8, 1974; and one of the teachers whose employment had been terminated, the aforesaid Thomas Belaire, applied to the District for employment and was hired by the Board of Education and began teaching on April 8, 1974; that at least prior to April 29, 1974, said Thomas Belaire was the only teacher who applied to the District for employment pursuant to the invitation extended to all terminated teachers by the Board of Education in the notice of termination dated April 2, 1974. (Exhibit 2 in hearing regarding temporary injunctive relief.)

21. The action is without merit.

22. This affidavit is made in support of a Motion for Summary Judgment by the defendants in the above action.

Dated this 20th day of June, 1974.

/s/ ROGER WEIHING

[Subscription omitted in printing]

[EXHIBIT A, WEIHING AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 23, 1974

Dear

On Thursday evening, March 21, the negotiating teams for the School Board and Hortonville Education Association met to continue negotiations. At that meeting the Board offered a new proposal, a copy of which is enclosed for your examination. The underlined provisions represent either tentative agreements or Board proposals. The Board proposed a salary schedule for 1974-75 with:

BA base --- $7900
MA base - -$8550

Teachers Retirement Contribution - 4½ %

The Board said to the HEA representatives that it hoped that such proposal would serve as the basis for an agreement. The proposal was not accepted. The HEA questioned whether the maternity leave provision tentatively agreed to conformed to State and Federal guideline. The two committies tentatively agreed to omit all reference to maternity leave in the agreement, and reply on the State and Federal guidelines.

When Thursday's meeting was adjourned, no further meetings were scheduled.

You should know the position of the School Board with respect to salary during a strike. Teachers who work on a scheduled school day will receive full pay for each day they work. Teachers who do not work will not be paid.

If the Board determines to operate schools during the strike, committments will need to be made prior to the conclusion of each day with respect to teaching personnel who will work the following day. Teachers who desire to resume work, are invited to contact the superintendent's office during regular working hours.

The School Board's legal counsel advises us of the following Statutory provisions which we specifically call to your attention. The Wisconsin Statutes, Section 111.70, provide that strikes by municipal employes (including teachers), are expressly prohibited. The School Board can not and will not condone unlawful activity under this Statute.

Wisconsin Statutes, Section 134.03, states in part that: "Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by fine not exceeding $100 or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment in the discretion of the court."

We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District

are fully informed that under State law, teachers' strikes are expressly prohibited.

Respectfully,

Roger Weihing
Robert Hauk
Merlin Plamann
Floyd Meyer
Victor Schroth
Ronald Suprise
Mrs. Jean Meads
/s/ Marvin Obry
BY Marvin Obry, Superintendent

[EXHIBIT B, WEIHING AFFIDAVIT]
HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Dear

The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for ————, April ——, 1974, at —— o'clock in the ———— noon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:
Roger Weihing, President

[Exhibit C, Weihing Affidavit]

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Abendroth, Ruby	March 29	Apr. 1, 10:00 P.M.
Addie, Jerry	April 1	Apr. 3, 8:40 P.M.
Alexander, Gwendoline	April 1	Apr. 3, 9:00 P.M.
Amburgy, John	March 29	Apr. 1, 9:00 A.M.
Anderson, Elaine	April 1	Apr. 2, 7:40 P.M.
Belaire, Thomas	April 1	Apr. 3, 9:00 A.M.
Beyer, Ethel	March 30	Apr. 2, 3:10 P.M.
Bradley, Linda	March 30	Apr. 2, 9:40 A.M.
Brusewitz, Ruth	April 1	Apr. 3, 9:20 P.M.
Cleven, Laura	March 30	Apr. 2, 3:30 P.M.
Couillard, Donna	March 29	Apr. 1, 9:40 P.M.
Couillard, Kenneth	March 29	Apr. 1, 9:20 P.M.
Dobberstein, Ardys	March 29	Apr. 1, 2:50 P.M.
Edler, Betty	March 30	Apr. 3, 2:50 P.M.
Eisenreich, Mildred	March 30	Apr. 3, 1:30 P.M.
Ellis, Leslie	March 29	Apr. 1, 3:30 P.M.
Emerich, David	March 30	Apr. 2, 10:00 A.M.
Emerich, Ray	March 30	Apr. 2, 12:50 P.M.
Emling, Esther	March 30	Apr. 2, 3:50 P.M.

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Exenberger, Janice	March 30	Apr. 2, 8:00 P.M.
Fraaza, Richard	March 30	Apr. 2, 1:10 P.M.
Friemark, Betty	March 30	Apr. 2, 10:20 A.M.
Fuerst, Hazel	April 1	Apr. 2, 10:40 A.M.
Grall, Patricia	March 30	Apr. 2, 9:00 A.M.
Gruetzmacher, Carol	March 29	Apr. 1, 3:50 P.M.
Grummer, Mabel	March 30	Apr. 2, 8:20 P.M.
Hammond, Ronald	April 1	Apr. 3, 1:50 P.M.
Hanke, David	April 1	Apr. 2, 8:40 A.M.
Haupt, Edith	March 30	Apr. 3, 2:10 P.M.
Herb, Kathryn	March 30	Apr. 2, 8:40 P.M.
Herwig, Sandra	March 30	Apr. 2, 9:00 P.M.
Hettiger, David	March 30	Apr. 2, 1:30 P.M.
Hildebrand, Russel	March 29	Apr. 1, 9:40 A.M.
Hmielewski, Ryan	March 29	Apr. 1, 8:00 P.M.
Hoffman, Carol	March 29	Apr. 1, 8:40 P.M.
Jacobson, Kay	March 30	Apr. 2, 1:50 P.M.
Jeffers, Peter	March 29	Apr. 1, 10:00 A.M.
Johnson, Darrell	March 29	Apr. 1, 10:20 A.M.
Johnson, Richard	March 30	Apr. 2, 11:00 A.M.
Jurkowski, Eleanor	March 30	Apr. 2, 9:20 P.M.
Keller, Edna	March 30	Apr. 2, 11:20 A.M.
Keller, Mary	March 30	Apr. 2, 9:40 P.M.
Krause, Eleanor	April 1	Apr. 3, 9:40 P.M.
Kreul, Paul	March 29	Apr. 1, 10:40 A.M.
Laabs, Winnifred	March 30	Apr. 1, 9:00 P.M.
Larget, James	March 29	Apr. 1, 8:20 P.M.
Larson, Jean	April 1	Apr. 3, 10:00 P.M.
Lauer, Rosemarie	March 29	Apr. 1, 11:00 A.M.
Lichte, Russel	March 30	Apr. 2, 2:10 P.M.
Lukesh, Lois	March 30	Apr. 2, 10:00 P.M.
Mertens, Kenneth	April 1	Apr. 3, 10:20 P.M.
Murphy, Judy	April 1	Apr. 3, 10:40 P.M.
Nadeau, Thomas	March 29	Apr. 1, 11:20 A.M.
Nelson, Lila	March 30	Apr. 1, 12:30 P.M.
Newhouse, Robert	March 29	Apr. 1, 12:50 P.M.
O'Hern, James	March 29	Apr. 1, 1:10 P.M.
Olson, Nancy	March 29	Apr. 1, 11:40 A.M.
Olson, Rosemarie	March 29	Apr. 1, 2:30 P.M.
Olson, James	March 29	Apr. 1, 9:20 A.M.
Pollard, Wilhelmine	March 30	Apr. 2, 2:30 P.M.
Powers, Margaret	April 2	Apr. 4, 12:00 P.M.

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Qualmann, Ruth	March 30	Apr. 1, 1:30 P.M.
Quinn, John	March 29	Apr. 1, 1:30 P.M.
Ratsch, Michael L.	March 30	Apr. 1, 2:10 P.M.
Rickaby, Jack W.	March 30	Apr. 2, 2:50 P.M.
Robson, Tharen	March 30	Apr. 2, 11:40 A.M.
Sachs, Susan	March 30	Apr. 2, 10:20 P.M.
Sasse, Avis	March 29	Apr. 1, 10:40 P.M.
Schindhelm, John	March 30	Apr. 3, 3:10 P.M.
Schnorr, Catherine	April 1	Apr. 3, 7:00 P.M.
Steeves, John	April 1	Apr. 3, 12:10 P.M.
Stutzman, Bruce	March 30	Apr. 3, 3:30 P.M.
Suess, Carolyn	March 30	Apr. 2, 10:40 P.M.
Thede, Quintin	March 30	Apr. 3, 2:30 P.M.
Thielke, Linda	March 30	Apr. 3, 3:50 P.M.
Triolo, Carlarae	March 30	Apr. 3, 11:30 A.M.
Van Thiel, Jay	April 1	Apr. 3, 11:50 A.M.
Wall, Jean	March 30	Apr. 3, 8:00 P.M.
Weber, Edward	April 1	Apr. 3, 12:30 P.M.
Weber, Patricia	March 30	Apr. 3, 8:20 P.M.
Weigandt, Linda	April 1	Apr. 3, 12:50 P.M.
Weyenberg, Kathleen	April 1	Apr. 1, 3:10 P.M.
Wilson, Kathleen	March 30	Apr. 2, 12:30 P.M.
Wisnoski, Michael	March 30	Apr. 2, 9:20 A.M.
Wood, Ed	April 1	Apr. 3, 7:40 P.M.
Zeinert, Karen	April 1	Apr. 3, 7:20 P.M.
Zimmer, Marilyn	March 30	Apr. 1, 10:20 P.M.
Zuehlke, Mary	March 30	Apr. 3, 1:10 P.M.

NOTE: Nancy Miller was not personally served with notice of hearing. On April 1 and 2, 1974 her legal representative, pursuant to authority granted by Ms. Miller authorized her matter to be heard on April 2, 1974.

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN

ss.

COUNTY OF DANE

MICHAEL WISNOKSI, being first duly sworn, on oath deposes and says:

1. That your affiant, Michael Wisnoski, is an adult resident of Outagamie County, State of Wisconsin, residing at Route 1, North Road, Appleton, Wisconsin. He is the President of the Hortonville Education Association and is by profession a public school teacher.

2. That he is a Plaintiff in the above entitled case.

3. That all the facts herein set forth are within his personal knowledge.

4. That at all times material hereto, your affiant has been a junior high school science teacher, science department chairman and elementary science consultant employed by the Hortonville School District No. 1. The 1973-74 school year was his seventh year of employment by said school district.

5. That the Hortonville Education Association represents all teachers employed by the Hortonville School District No. 1 and is the collective bargaining agent for said teachers.

6. That on the evening of January 23, 1974, the Hortonville Education Association met with the Hortonville Board of Education. The Association made a proposal to the Board, which the Board flatly rejected. The Board did not offer any counterproposals during the course of the meeting, which lasted until dawn. As a result of the failure of the Board to offer any response to the Association's proposal, the Association began informational picketing on January 24, 1974. This informational picketing continued through January 30, 1974.

Said informational picketing terminated on or about January 30, 1974. At no time was a final agreement ever reached on a 1973-74 collective bargaining agreement.

7. At about 7:30 o'clock in the evening on Saturday, March 30, 1974, your affiant was served a notice by the Hortonville Board of Education that it had scheduled a hearing, to determine whether or not to discharge him, for Tuesday morning, April 2, 1974, at 9:20. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974. Only individual teachers were notified of the scheduled Board hearings. The Association was not given any notice by the Board of said hearings involving the employees it represents. The Association did not receive notice as to which of its members had received said Notice of Hearing.

8. On Monday, April 1, 1974, your affiant appeared with his attorney, Bruce Ehlke, before the Hortonville Board of Education. At that time, Attorney Ehlke objected to the inadequate notice he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare his defense. The Board, through counsel, requested that Mr. Ehlke more specifically indi-

cate the amount of time that his clients would need to prepare a defense, to the allegations contained in the individual notice of hearing. Mr. Ehlke responded that he wanted to put in evidence of the conduct of the Board. Mr. Ehlke stated that after putting in said evidence he would let the Board know if he needed more time. Mr. Ehlke was never permitted to question the Board members or to put in said evidence. Mr. Ehlke's objection to lack of adequate and timely notice was dismissed by the Board.

9. At said proceedings, Mr. Ehlke objected to the Board sitting as the decision maker in any hearing concerning your affiant's discharge, because the Board itself was involved as an adverse party in the very dispute that had generated the Board's action to discharge him. This objection was also dismissed by the Board.

10. Mr. Ehlke requested to present evidence in this affiant's defense and in mitiation of any conduct on his part that the Board might consider to be a basis for terminating his employment. This request was denied by the Board on the advice of the Board's legal counsel, Mr. Ruhly, who declared said evidence to be immaterial.

11. Your affiant authorized the Hortonville Education Association to respond in his behalf at the April 1, 1973, proceeding. Your affiant chose to follow Mr. Ehlke's advice and not individually answer any questions from Board members. The Board's questions under the circumstances constituted coercion and harassment in a labor dispute.

12. Mr. Ehlke and your affiant were advised by Mr. Ruhly that the only inference the Board then was con-

sidering it might draw from your affiant's refusal to answer said questions was that the Association's members were engaged in a work stoppage. At no time did either Mr. Ehlke or your affiant, or any other Association member present at the hearing, ever state that such an inference was factually appropriate or lawfully to be drawn from a refusal to answer the Board's questions. Further, your affiant believes that, even if such a factual inference is drawn, without more, no legal conclusion can be drawn from it.

13. On April 3, 1974, your affiant received a letter from the Board of Education which letter notifies him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On that same day your affiant also received in the mail a copy of the Board resolution which decreed that all teachers represented by the Hortonville Education Association, except one, were discharged, and that the Board would dishonor the teaching contracts for the 1974-75 school year that it previously had tendered to said teachers.

14. Ms. Tonia Stamborski, one of the Hortonville teachers served with a Notice of Hearing, appeared separately before the Board and was not represented by the Association. Ms. Stamborski received only a reprimand from the Board and her employment was not terminated. She was treated differently than the teachers who were represented, before the Board, by the Association.

15. At no time has your affiant ever been informed of the evidentiary basis for the Board's conclusion that he has breached his contract or engaged in an unlawful strike. Your affiant, further, has never been informed of

the evidentiary basis for the Board's decision to terminate his employment, both for the 1973-74 school year and for the 1974-75 school year as well.

16. The decision to terminate the employment of your affiant was made by the Board at a special meeting on April 2, 1974. No notice of said special meeting was ever given to your affiant, the Association or the public in general.

17. The Board has hired temporary and permanent replacements for members of the Association and other teachers discharged by the action of the Board on April 2, 1974.

18. Your affiant says that he is entitled to maintain the above captioned action and this affidavit is made in opposition to a Motion for Summary Judgment by the Defendants.

Dated this 25 day of June, 1974.

/s/ MICHAEL WISNOSKI

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974 to which the defendants responded by way of a verified answer filed April 24, 1974. Subsequently on May 31, 1974 the plaintiffs upon leave of this Court and pursuant to a verbal agreement of counsel for all parties filed a verified amended complaint alleging four separate causes of action. Prior to the expiration of forty days after joinder of issue by the defendants' answer to the original complaint, this Court by an order dated June 3, 1974 extended the time for moving for summary judgment pursuant to Secs. 269.45 and 270.635, Stats., inasmuch as this Court construed Snowberry vs. Zellmer (1964), 22 Wis. 2nd 356; 126 NW 2nd 26, to require a motion for summary judgment to be made within forty days of joinder of issue by the original pleadings. The defendants answered the first cause of action alleged in the amended complaint and moved thereafter for summary judgment as to the first cause of action within the enlarged time allotted by the Court.

DECISION:

The motion for summary judgment now before this Court pertains to a cause of action based on a theory of various due process violations arising out of a strike by the plaintiff teachers of the Hortonville Joint School District No. 1. The strike commenced March 18, 1974 and on April 2, 1974 the Hortonville Board of Education terminated the employment of the 88 members of the plaintiff class. Certain members of the plaintiff class have returned to work pursuant to an order of another Court, which order is now in the appeal process. However, those members of the plaintiff class who have returned to work have continued as members of the plaintiff class in the present action.

The plaintiffs in the present case are the Hortonville Education Association which, prior to March 18, 1974 represented all teachers under contract with the Hortonville Joint School No. 1, and six of the terminated teachers who are alleged to be "representative of all teachers employed by the District whose employments the Board has acted to terminate." The requisite allegations are set forth in the plaintiffs' amended complaint so as to enable this Court to deem the present matter a class action as provided for in Sec. 260.12 Stats.

One of the defendants is the Hortonville Joint School District No. 1 which had prior to April 2, 1974 employed the plaintiff class; the remaining defendants are members and officers of the Hortonville Board of Education in their official and individual capacities as well as three administrators of the Hortonville Joint School District No. 1 in their official and individual capacities.

Termination of employment by the Hortonville Board

of Education was applicable to the 1973-74 school year contracts with the individual members of the plaintiff class and the 1974-75 school year contracts which had been tendered by the Hortonville Board of Education to the individual members of the plaintiff class. There exists no master contract between the Hortonville Education Association and the Hortonville Joint School District No. 1 for either the 1973-74 and 1974-75 school years.

In order to determine if the defendants have set forth such facts as shall show their denials or defenses to be sufficient to defeat the plaintiffs' first cause of action under the statutory criteria of Sec. 270.635, Stats. it appears appropriate in this instance to first consider the plaintiffs' theory of various procedural due process violations as set forth in the plaintiffs' amended complaint. This Court, as did the Court in American Mutual Liability Insurance Company vs. St. Paul Fire and Marine Insurance Company (1970), 48 Wis. 2nd 305; 179 NW 2nd 864, finds it necessary to review in part the amended complaint in order to determine whether the defendants' affidavit in support of their motion for summary judgment contains the required evidentiary facts so as to entitle the defendants to summary judgment. However, the amended complaint as well as the defendants' answer, as pleadings, are not effectual as factual proof and cannot perform the requisite function of affidavits. Leszczynski vs. Surges (1966), 30 Wis. 2nd 534; 141 NW 2nd 261. Only two affidavits were filed herein. Mr. Roger Weihing, a member and president of the Board of Education of the Hortonville School District No. 1, filed an affidavit in support of the defendants' motion for summary judgment. Mr. Michael Wisnoski, a member of the plaintiff class and president of

the Hortonville Education Association, filed an affidavit on behalf of the plaintiffs in opposition to the motion for summary judgment.

Paragraph 5 of the amended complaint is the first material paragraph containing allegations relating to procedural due process. That paragraph, in its entirety, alleges:

> "5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1975, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment."

The affidavit of Roger Weihing, submitted on behalf of the defendants states in paragraphs 8 and 9 essentially that during a special School Board meeting held on March 29, 1974 it was decided to schedule disciplinary hearings for each individual member of the plaintiffs class then engaged in a work stoppage and that a notice of the disciplinary hearings were delivered to the Outagamie County Sheriff's Department on March 29, 1974 for service on each individual teacher. Exhibit "B" attached to Mr.

Weihing's affidavit is a copy of the notice of the individual disciplinary hearings. Also attached to that same affidavit and identified as exhibit "C" is a compliation of the dates the disciplinary hearing notices were served on the individual members of the plaintiff class and the date and times of the scheduled disciplinary hearings. It appears from exhibit "C" that all the teachers subject to a disciplinary hearing were served notice of such hearing on or before April 2, 1974 with the exception of Mrs. Nancy Miller. In all, eleven teachers were served notices, including the day of service, four days before their scheduled hearing, fifty-one teachers three days prior to their scheduled hearing, twenty-two teachers two days prior to their scheduled hearing, three teachers one day prior to their scheduled hearing and one teacher received her notice the day of her scheduled hearing. It shou'd be noted that the first notices were served on March 29, 1974 which was a Friday (twenty-three in number) with the balance being served on the next day, a Saturday (fourty-four in number) and both Monday (twenty in number) and Tuesday (one in number) of the following week. As to the actual contents of the notice of disciplinary hearings, the dates the notices were served and the dates of the scheduled disciplinary hearings no factual controversy exists.

However, with respect to the aforesaid notices and their service on the teachers it is the plaintiffs' conclusion as stated in the amended complaint that such notice did not give them adequate opportunity to:

a) consult an attorney

b) prepare for their scheduled hearings

c) defend against reasons the School Board might consider for termination of employment.

By means of Mr. Weihing's affidavit, in particular paragraphs 9 and 10 thereof the defendants have set forth facts relating to the conduct and statements of plaintiffs' counsel at the April 1, 1974 hearing before the Hortonville Board of Education. That meeting was attended by all members of the plaintiff class in mass rather than individually as scheduled with the exception of five teachers who remain members of the plaintiff class. Among those facts are the plaintiffs' appearance before the Hortonville Board of Education with an attorney, the objection of the plaintiffs' attorney to the insufficiency of the notice without a specified request as to the additional length of time needed for preparation or a request for an adjournment and the participation of plaintiffs' counsel in the proceedings. On the basis of those primary facts the defendants urge that it can reasonably be inferred that the notice in question was timely and adequate and, if not, any objection thereto was waived by failure to specifically request an adjournment of a specified length.

With respect to the adequacy and timeliness of the notice of the disciplinary hearings this Court deems there to be no controverted facts. Only the inferences to be drawn from those facts upon which legal conclusions can be based are in dispute. This is not to say, however, that such inferences are reasonable.

Paragraph 6 of the plaintiffs' amended complaint relates to the actual procedure utilized at the April 1, 1974 appearance of all but five members of the plaintiff class before the Hortonville Board of Education. In its entirety paragraph 6 recites:

"6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to present evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs. No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board."

Scrutinizing Mr. Weihing's affidavit submitted on behalf of the defendants with respect to that portion pertaining to the April 1, 1974 proceedings before the Board of Education, there are the following pertinent facts:

a) counsel for the plaintiffs did object to the sufficiency and adequacy of the disciplinary hearing notices

b) counsel for the plaintiffs was denied the opportunity to question various Hortonville Board of Education members adversely

c) counsel for the plaintiffs did make an offer of proof

d) counsel for the plaintiffs instructed the members of the plaintiff class not to answer questions addressed to them individually and the plaintiff class did not individually respond to any questions by the Board of Education

e) counsel for the plaintiff advised the Board of Education that all members of the plaintiff class were relying on the Hortonville Education Association to respond on their behalf and that indivdiual hearings were not necessary.

The evidentiary facts contained in the plaintiffs' affidavit in opposition to the motion for summary judgment do not controvert the facts related above as they appear in the defendants' supporting affidavit. The plaintiffs' affidavit does, however, add the additional facts that counsel for the plaintiffs objected to the Hortonville Board of Education acting as decision-maker and its counsel acting in a dual capacity as adviser and prosecutor. Neither the affidavit submitted by the defendants or the plaintiffs actually state whether evidence was received at the April 1, 1974 hearing beyond the offer of proof made by plaintiffs' counsel.

It should be noted that paragraph 10 of the affidavit of Michael Wisnoski submitted on behalf of the plaintiffs stated that the Board of Education refused to permit evi-

dence to be presented on behalf of Mr. Wisnoski by way of a defense and in mitigation of any conduct on his part. As to whether that statement refers to evidence in addition to the offer of proof made by plaintiffs' counsel and the request to adversely examine various Board of Education members is unclear unless read in conjunction with paragraph 11 of that same affidavit. Paragraph 11 states that Mr. Wisnoski authorized the Hortonville Education Association to respond on his behalf and he personally chose to follow his counsel's advice not to respond individually. The only reasonable inference from the apparently contradictory statements of fact is that paragraph 10 of Mr. Wisnoski's affidavit in conjunction with the remainder of his affidavit, and in particular paragraph 11, refers to the offer of proof and the attempt to adversely examine the Board of Education members on behalf of all teachers represented by the Hortonville Education Association, not any additional attempt to present evidence on behalf of Mr. Wisnoski individually. Also, it should be noted that Mr. Wisnoski's individual disciplinary hearing had been scheduled as shown by exhibit "C" not for April 1st but for 9:20 a.m. on April 2, 1974.

The material facts as to the procedure of what the plaintiff class turned into a mass disciplinary hearing on April 1, 1974 are not controverted. It is only the inferences to be drawn from those facts and various statements made by counsel for both the plaintiffs and the defendants that are disputed.

Considering next paragraph 7 of the plaintiffs' amended complaint it is alleged:

> "7. By letters dated April 2, 1974, the plaintiffs and, on information and belief, almost all other

> teachers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year."

A copy of the termination notice was not attached to the affidavit submitted on behalf of the defendants in support of their motion for summary judgment. However, paragraph 16 of the defendants affidavit specifically refers to and identifies the termination notice in question and thereby incorporated by reference exhibit 2 introduced at a prior evidentiary hearing conducted by this Court. The notice of termination provided in pertinent part:

> The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically it is found that since March 18, 1974:
>
> You breached your individual employment contract; You engaged in strike activity contrary to Wisconsin law.
>
> The Board further found that these breaches of duty in law constitute good and sufficient cause for the immediate termination of your teaching contract.
>
> Therefore, you are advised that your employment

with the Hortonville Community Schools, Joint School District No. 1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract."

The defendants' affidavit further states that the aforementioned notice of termination was sent by certified mail to each terminated member of the plaintiff class. Nothing in the affidavit of Mr. Wisnoski submitted on behalf of the plaintiffs controverts the contents or mailing of the notice of termination. According to the plaintiffs' affidavit, on April 3, 1974 he received a copy of the Board of Education's resolution to terminate the plaintiff class. Additionally, Mr. Wisnoski states in his affidavit in paragraph 15 that he has personally never been informed of the evidentiary basis for the Board of Education's conclusion that he has breached his contract or engaged in an unlawful strike, nor that he was ever informed of the evidentiary basis for the decision to terminate his employment for the 1973-74 and 1974-75 school years.

Once again it is apparent that as to the pertinent material facts relating to alleged due process violations as set forth in paragraph 7 of the plaintiffs' amended complaint there is no dispute other than as to the inferences to be drawn from the facts.

Reviewing next paragraph 8 of the plaintiffs' amended complaint it is alleged therein:

"8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before

the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association."

There is no reference contained in the defendants' affidavit that Mr. Weihing addressed to notice to the Hortonville Education Association itself with respect to the scheduled disciplinary hearing of April 1, 2 and 3, 1974 and the decision to terminate the employment of the plaintiff class. In paragraph 7 of the plaintfffs' opposing affidavit it is stated that no advance notice was given to the Hortonville Education Association as an organization with respect to the disciplinary hearings. In paragraph 13 of the plaintiffs' affidavit it is futther stated that notice of the Board of Education decision to terminate the members of the plaintiff class was received post facto.

Concerning the question of advance notice to the Hortonville Education Association there appears in the affidavits no controverted facts as to the lack of advance notice of the disciplinary hearings and the decision to terminate the employment of the plaintiff class.

Summarizing the plaintiffs' allegation of specific procedural due process violations they are in substance in brief:

a) Timeliness and adequacy of the disciplinary notices.

b) Board of Education sitting as decision-maker at the disciplinary hearing.

c) Prohibition of adverse examination of various

Board of Education members at the disciplinary hearing.

d) Counsel for the Board of Education simultaneiously acting as adviser and prosecutor.

e) No evidence against the plaintiff adduced at the disciplinary hearing.

f) Lack of notice of evidentiary basis for concluding there was a breach of contract and an unlawful strike nor notice of evidentiary basis for termination of employment.

g) Lack of advance notice to the Hortonville Education Association concerning the disciplinary hearings and the termination of employment of the plaintiff class.

On the basis of the foregoing alleged violations of procedural due process the plaintiffs formulate their theory of the first cause of action in their amended complaint. The plaintiffs allege that all of the aforesaid due process violations were done under color of State law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith and as part of a conspiracy to deny the members of the plaintiff class their procedural due process rights under the 14th Amendment to the United States Constitution and Article 1 of the Wisconsin Constitution. As a result, the plaintiffs allege, inter alia, that they have effectively been denied their property interest in continued employment with the Hortonville Joint School District No. 1 as well as their liberty in securing employment in the teaching profession. Such deprivation of procedural due process the plaintfffs further allege has resulted in irreparable

damage to their persons, reputations and financial interests.

As stated by the Court in American Mutual Liablity Insurance Company vs. the St. Paul Fire and Marine Insurance Company, supra, at page 312, a motion for summary judgment, when invoked by a defendant is used on the assumption that even though a complaint states a cause of action the cause is factullly unsupportable. Inasmuch as the Court has deemed there to be no dispute as to the material facts involved in this case, if the defendants' affidavit in support of the motion for summary judgment contained no additional facts this Court could deem the defendants to have attempted to use a motion for summary judgment as a substitute for a demurrer.

However, there remains one fact in the defendants' affidavit by Mr. Weihing which is uncontroverted by the plaintiffs' affidavit in opposition to the motion for summary judgment. That fact is set forth in paragraph 2 of Mr. Weihing's affidavit which reads:

> "That commencing Monday, March 18, 1974, the teaching employees then employed by said school district engaged in an unlawful strike against the defendant school district; . . ."

Reference to the strike being unlawful is, of course, a conclusion and not a fact and as such, is inappropriate in an affidavit requiring evidentiary facts. Sec. 270.635, Stats. Continuing through the remainder of Mr. Weihing's affidavit it is clearly stated that the strike by the members of the plaintiff class continued up to and through April 2, 1974, the date of the employment discharges. Thus, it is uncontroverted that the underlying fact that a

strike existed commencing March 18, 1974 establishes the framework within which this Court can consider the concept of due process. For as the Court stated in Goldberg vs. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, 1018, 25 L. Ed. 2nd 287 (1970), in quoting an earlier case:

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

EMPLOYER-EMPLOYEE RELATIONSHIP SUBSEQUENT TO MARCH 18, 1974

The individual members of the plaintiff class were prior to March 18, 1974 municipal employees as defined in Sec. 11.70(1)(b), Stats., [sic] and the Hortonville Joint School District No. 1 was at all times pertinent herein a municipal employer as defined in Sec. 11.70(1)(a), Stats. [sic] Thus at all times relevant the members of the plaintiff class were prohibited from engaging in a strike by virtue of Sec. 117.70(4)(1) [sic] which provides:

> "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county of municipal employee and such strikes are hereby expressly prohibited."

It is urged by the defendants that this Court equate the terms "strike" and "quit" thereby alleviating any constitutional duty on their part to grant the plaintiff class due process. This State has not adopted that position with respect to strikes in the public employment sector nor have

the defendants cited authority from other jurisdictions on that point. In the private employment sector the Wisconsin rule is that a strike is a cessation of work on the part of strikers and does not in and of itself constitute a termination of the employer-employee relationship; it is a subsequent discharge which severs the employer-employee relationship. Marathon Electric Manufacturing Corporation vs. Industrial Commission (1955) 269 Wis. 394; 69 NW 2nd 573. Fredericks vs. Industrial Commission (1958) 4 Wis. 2nd 519; 91 NW 2nd 93. In fact, it is a frequent practice in this State for a municipal employer to obtain a court injunction when confronted with a strike. Such a procedure is based on the existence of an employer-employee relationship. While no longer valid law, Sec. 111.70(7), Stats., (void since September 1, 1973) referred to "employe" and "employer" in a public employment strike situation wherein the legislature prescribed the penalty for continuing to engage in a strike after a court injunction was issued. In their brief the defendants have made reference to obtaining a Court order enjoining the strike as one of the options available to them which they need not have nor did they exercise. This Court can see a grave consequence to the general public by equating the terms "strike" and "quit" when one considers police, fire and sanitation personnel striking in metropolitan areas. Operations would not only be at a standstill but would be hampered long after commencement of a strike. I find no basis in law nor in public policy that compels construing a prohibited public employment strike as in and of itself terminating the municipal employer-employee relationship.

DUE PROCESS CONCEPT OF PROPERTY AND LIBERTY

As employees of the Hortonville Joint School District No. 1 it must be next determined if the members of the plaintiff class were entitled to a due process hearing. The State action involved is, of course, the discharge by the school district which is created and controlled by State law and State agencies. The property interest of the plaintiffs does not arrive by means of statutory provision because Chapter 118 of the Wisconsin Statutes does not provide for tenure for teachers employed in a school operating and lying in a county having a population less than 500,000. Section 118.21, Stats., does, however, require individual contracts to be executed between individual teachers and school boards. In addition, Sec. 118.22, Stats., establishes the mechanism for renewal or refusal to renew such individual contracts, but no procedure for discharge is established by statute. Sec. 118.22, Stats., further requires that notice of renewal or refusal to renew individual contracts must be given on or before March 15 of each year. Although the plaintiff class was engaged in a prohibited strike when discharged, the members of the plaintiff class retained an interest in continued employment. Perry vs. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 570 (1972) and Board of Regents of State College vs. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 548 (1972) involved nonrenewal of untenured teachers who had one year contracts. Although the Court in Roth, supra, held the teacher not to be entitled to due process because he had no interest or entitlement to future employment, the Court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to indicate those claims.
>
> "Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 577, 92 S. Ct. 2709)

In Perry, supra, the Court did find a denial of due process stating:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." (408 U.S. 601, 92 S. Ct. 2699)

A summary dismissal of an untenured teacher not under formal contract without a hearing or inquiry was contrary to due process on the basis of an implied promise of continued employment. Connell vs. Higgenbotham (1971) 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 418.

Certainly the plaintiff teachers relied on their employment with the defendant Hortonville Joint School District No. 1. Prior to discharge the plaintiff teachers were entitled to their jobs for the remainder of the 1973-74 school year with the valid expectation of continued employment for the 1974-75 school year. Such objective expectation of continued employment could in part be founded in the statutory dictates of Secs. 118.21 and 118.-22, Stats., with respect to the mandatory existence of individual teacher contracts and nonrenewal procedures for those contracts. In addition to their existing individual contracts for the school year 1973-74, the plaintiff teachers had been tendered contracts for the 1974-75 school year. Thus this Court deems the members of the plaintiff class to have the requisite property interest, that is, expectation of continued employment with the defendant Hortonville Joint School District No. 1 so as to entitle them to a due process hearing.

The Court in Roth, supra, also addressed itself to the issue of deprivation of liberty of a result of a stigma attached stemming from charges against an individual wherein it is stated:

> "[W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (citations omitted; 408 U.S. 573, 92 S. Ct. 2702)

In the instant case the charges asserted against the plaintiff teachers were that they had breached their individual contracts and engaged in an unlawful strike contrary to Wisconsin law. While those charges do not bear the same

stigma as would charges of immorality or dishonesty, they do constitute charges that in all likelihood would diminish the plaintiff teachers' prospective employment opportunities. Thus this Court also deems there to be a singificant potential deprivation of liberty because of the nature of the charges so as to entitle the plaintiff class to a due process hearing.

DUE PROCESS PROCEDURES

Having been entitled to a due process hearing and having been granted a hearing it must next be determined if the hearing granted the plaintiff teachers was constitutionally anticeptic within the framework of due process. This Court has previously found no controverted facts to exist as to the hearing procedures utilized by the defendants. The concept of due process is not static nor are its ramifications identicial in every situation. The Court in Arnett vs. Kennedy — U.S. —, 94 S. Ct. 1633, 1645, — L. Ed. 2nd — (1974) notes:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " (citation omitted)

Thus the principals of due process in the instant case must be tempered by the underlyng facts as presented in the affidavits filed in support of and in opposition to the mo-

tion for summary judgment. The factual setting involves a strike by the members of the plaintiff class who constituted all but a few teachers then under contract with the Hortonville Joint School District No. 1. The effect of the strike which commenced March 18, 1974 was to completely bring the operations of the school in that district to an immediate and complete halt. By means of substitute teachers the schools resumed operations sporatically after March 25, 1974 until April 2, 1974 when the Board of Education voted to terminate the employment of the plaintiff class. After April 8, 1974 the schools were again opened permanently with the employment of "replacement" teachers. It is within the framework of the foregoing facts that this Court determine, if it can do so as a matter of law, whether the plaintiff class was accorded due process.

It is undisputed that a letter dated March 23, 1974 was sent to each member of the plaintiff class by the superintendent of the Hortonville Joint School District No. 1 advising that the strike was contrary to Sec. 111.70, Stats., and further that: "The School Board can not and will not condone unlawful activity under this statute." The letter, a copy of which has been identified as exhibit "A" and attached to the defendants' affidavit herein concluded by stating: "We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District are fully informed that under State law, teachers' strikes are expressly prohibited."

Next, the record pertinent to the motion for summary judgment states that the members of the plaintiff class were served a notice of disciplinary hearing between March 29 and April 1974. Exhibit "B" attached to the defendants' affidavit in support of the motion for summary judgment accomplished the following purposes:

a) disclosed the precise charge made against the individual teacher - since March 18, 1974 the existence of a breach of the individual employment contract and engagement in an unlawful strike contrary to Wisconsin law

b) identified who made the charge - Superintendent Obry

c) advised of possible disciplinary action - termination of employment contract

d) established specified date, time and place of hearing

e) informed individual teachers of opportunity to present any statement or evidence relevant to the alleged conduct.

The teachers named as plaintiffs in this case and who allege themselves to be representative of the entire class of teachers were served notice not less than two days nor more than three days prior to their scheduled hearing time. Hence the crucial issue with respect to notice is whether such notice under the conditions related above were adequate and timely. In Goldberg, supra, the Court held a due process hearing essentially in terminating welfare benefits and stated therein:

> "The fundamental requisite of due process of law is the opportunity to be heard. (citations omitted) The hearing must be at a meaningful time and in a meaningful manner. (citation omitted) In the present

> context the principals require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. (397 U.S. 267, 268, 90 S. Ct. 1020)

Considering the due process requirements in the case of teacher dismissed during the school year upon a two day notice of hearing and after an oral statement of reasons for a suspension commencing four days prior to the notice of hearing, the Court in Ahern vs. Board of Education of School District of Grand Island, 456 F. 2nd 399, 403 (8th Cir. 1972) stated:

> ". . . she might have been notified with greater precision of the basis for her suspension and dismissal, and the time between the notice and the hearing might have been greater, and the school board might have detailed its decision in a formal writing, none of these ideal conditions are prerequisites to a finding that a hearing has been granted which comports with accepted notions of procedural due process. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)

Applying the foregoing due process standard as set forth in Goldberg, supra, and Arnett, supra, which were drawn from earlier U.S. Supreme Court decisions cited in Ahern, supra, to the case at bar the undisputed facts show an adequate and timely notice to have been given to the plaintiff class under the then existing condition of forced

school closings as a result of the prohibited strike. The notice provided by exhibit "B" attached to the defendants' affidavit herein unequivocally stated the precise nature of the charge, its source, the possible consequences as well as the time and manner in which the members of the plaintiff class could refute the charge. Counsel for both parties cited numerous cases involving various fact situation in which notice of a specific duration was deemed constitutionally appropriate. Those cases, however, deal with areas of law most dissimilar to the area of employer-employee relationship in a prohbited strike setting such as the present case. What this Court deems to be adequate and timely notice as a matter of law in the present case is done in the context of the nature of the charge. The plaintiff class either was on strike in violation of Sec. 111.-70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.70(4)(1) expressly prohibits strikes in the public employment sector. As this Court has previously held in a ruling on a request by the plaintiffs for temporary injunctive relief, Wisconsin does not recognize that strikes in the public employment sector are permissible where justified or provoked. If the State law prohibiting public employment strikes was not so express or provided exceptions to the strike prohibition, this Court could not readily deem the notice of disciplinary hearing to be timely and adequate as a matter of law. Had the plaintiff class been charged additionally with an indefinite allegation such as misconduct or inefficiency, then the notice in question might very well not be adequate or timely

within the concept of due process. Inasmuch as there can be no legal defense to the charge of striking in violation of Sec. 111.70(4)(1) of the Wisconsin Statutes this Court cannot foresee the need of a notice of longer duration in order to defend against such charge. Simply, the plaintiff class either was or was not on strike.

As noted earlier in this decision there is no controversy in the fact that the Hortonville Board of Education sat as the decision maker, that the plaintiffs were prohibited from adversely examining various members of the Board of Education and that counsel for the Board of Education acted in the dual capacity of adviser and prosecutor. As a matter of law these factors do not constitute a deprivation of due process.

Numerous U.S. Supreme Court decisions do require the decision-maker in a due process setting to be impartial. But again due process must be viewed within the framework of the setting of the present case. Sec. 118.22, Stats., provides in pertinent part:

> "No teacher may be employed or dismissed except by a majority vote by a full membership of the board."

Thus no one but the Board of Education could by State law make the decision which ultimately was made to discharge the teachers. Then too, the charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similar to charges of misconduct or inefficiency where it would be necessary for the decision-maker to judge the credib'ity of witnesses and weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the

degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to have been discharged for any constitutionally impermissible reason.

With respect to the denial of the opportunity to adversely examine various members of the Hortonville Board of Education it must first be pointed out that it was Superintendent Marvin Obry and not any member of the Board of Education who charged the plaintiffs with striking. In a due process setting it is necessary that there be afforded an opportunity to confront and cross-examine adverse witnesses. Go'dberg, supra; Greene vs. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2nd 1377 (1959). The members of the Hortonville Board of Education on the uncontroverted facts were not adverse witnesses. The purpose of the plaintiffs' attempt to adversly examine the board members was stated at the April 1, 1974 hearing which was reported and the transcript thereof incorporated in the defense affidavit in support of the motion for sumary judgent. Plaintiffs' counsel at that hearing was asked to indicate the nature of the evidence he wished to present and he responded in this fashion:

> "Yes, it goes to bargaining here, and I have some questions of some of the Board members." p. 28 of transcript)

Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts invo'ving negotia-

tions on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examinaton of various board members in this context was proper.

Considering the dual capacity of the Board of Education's counsel as adviser and prosecutor this Court finds no such constitutional prohibition. The citations presented to this Court by the plaintiffs deal with economic or personal conflicting interests of the decision maker. In this situation the capacities of adviser and prosecutor are not constitutionally incompatible.

Also uncontroverted are the contents of the transcript of the April 1, 1974 hearing and the termination notice both of which were incorporated by reference in the defendants' affidavit in support of the motion for summary judgment. The transcript of the April 1, 1974 hearing contains the following statement of plaintiffs counsel:

> "We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript, emphasis added)

The plaintiff class whose members had individual hearings scheduled for the morning of April 1, 1974 had their hearings called. Their attorney who was present advised the Board of Education that no individual member of the plaintiff class would answer any question or participate on an individual basis. Thereafter all members of the plaintiff class then represented by counsel on an individual basis, eighty-two in number, advised the Board through counsel that they desired one mass hearing instead of individual hearings as had been scheduled; further they advised through counsel that they would not respond to any questions put to them by the Board on an individual basis. The same procedure was followed on a subsequent date for members of the plaintiff class not represented by counsel on April 1, 1974.

In a statement to the Board at the April 1, 1974 hearing plaintiffs' counsel advised that the eighty-two individuals he then represented discussed the only inference the Board stated it would draw from the plaintiffs' refusal to answer questions individually, namely, that the plaintiffs were "engaged in a work stoppage." (P. 24 of transcript) Plaintiffs' counsel only objected to any legal conclusions being drawn from such factual inference. Whereupon the Board of Education rested and the plaintiffs as a body attempted to adversely examine some members of the Board and made an offer of proof as was discussed above in connection with collective bargaining issues.

Also discussed earlier in this decision was the contents of the notice of termination dated April 2, 1974. The notice of termination in brief, informed the plaintiff class that they had been found guilty of the conduct charged in the notice of hearing dated March 29, 1974 namely, having since March 18, 1974 breached their individual employment contracts and engaging in strike activity contrary to Wisconsin law.

The purpose of disclosing the evidentiary basis in a due process setting was stated in Green vs. McElroy, supra:

> "Certain principals have remained relatively immutible in our jurisprudence. One of these is that where

> governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (emphasis added) (360 U.S. 496, 79 S. Ct. 1413)

In the instant situation the plaintiff class knew the Board of Education had before it the information of Superintendent Obry that the teachers were on strike as noted in the notice for disciplinary hearings dated March 29, 1974. Also the plaintiff class knew, by means of a letter sent to them under the date of March 23, 1974, a copy of which was marked exhibit "A" and is attached to the defendants' affidavit in support of the motion for summary judgment, that the Board of Education had personal knowledge of the existing strike. As stated by plaintiffs' counsel at the April 1, 1974 hearing referring to the plaintiff class:

> ". . . they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript)

Thus in the present setting it would be superflous for anyone to state on the record that the plaintiff class was engaged in a strike. The plaintiff class was warned that their refusal to answer questions would result in an inference that they were "engaged in a work stoppage" in violation of their individual employment contracts and in violation of State law. Subsequently, the April 2, 1974 termination notice advised the plaintiff class that the members were found guilty of the conduct alleged in the notice of disciplinary hearing, that is, striking in violation of their individual employment contracts and State law. The applicable constitutional test is not what was the evidence adduced at the hearing or detailed in the termination notice, but rather was the basis of the Board of Education's case sufficiently disclosed so that the plaintiff class could show the evidence to be untrue.

The plaintiff class was sufficiently informed of the charges and their source so as to have a meaningful opportunity to defend themselves and decide if they had been discharged for constitutionally impermissible reasons. There are no other reasonable inferences or conclusions to be drawn from the uncontroverted facts. Therefore, this Court finds the evidence considered by the Board as disclosed to the plaintiff was sufficient to accord them due process as a matter of law in this particular setting.

With respect to lack of prior notice to the Hortonville Education Association in any of the procedures utilized by the Board of Education this Court finds no duty to afford the Hortonville Education Association with due process inasmuch as the contracts involved were those of individual teachers who were individually given notice and individually provided an opportunity for an individual hearing on their individual participation in the strike. As a practical matter, the Hortonville Education Association membership constituted the plaintiff class and the Association did appear at the April 1, 1974 disciplinary hearings. The interests of property and liberty involved here were those of the individual teachers, not the Hortonville Education Association. If the Hortonville Education Association was entitled to due process for considerations other than due process, remedies in another forum are available.

Perhaps the most volitable issue in this entire factual

setting is the allegation that the defendants conspired to deny the plaintiff class of due process. However, this Court having found no due process violations to exist within the context of this motion for summary judgment, the Court deems it unnecessary to discuss this issue further.

SUMMARY

Upon consideration of the defendants' affidavit in support of the motion for summary judgment together with the attached and incorporated documents this Court deems the defendants to have made a prima facie case.

After consideration of the plaintiffs' affidavit in opposition to the motion for summary judgment the Court deems that no material controverted facts exist.

There being no evidentiary facts in the affidavits from which reasonable but different inferences could be drawn, this Court can only conclude that although the plaintiffs have stated a cause of action such cause of action is factually unsupportable.

In addition, this Court finds as a matter of law:

1. The strike which commenced March 18, 1974 did not per se sever the relationship of employer-employee between the plaintiff teachers and the defendant Hortonville Joint School No. 1;
2. The plaintiff teachers in spite of a strike in violation of Sec. 111.70(4)(1), Stats., were entitled to due process procedures to protect their property and liberty interests; and
3. The plaintiff teachers were duly accorded due

process as required by the 14th Amendment of the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

Therefore, the defendants' motion for summary judgment must be granted. Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

BY THE COURT

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

DECISION ON DEMURRERS TO SECOND, THIRD AND FOURTH CAUSES OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974 to which the defendants responded by way of a verified answer filed April 24, 1974. Subsequently on May 31, 1974 the plaintiffs upon leave of this Court and pursuant to verbal agreement of counsel by all parties filed a verified amended

complaint alleging four distinct causes of action. Thereafter the defendants demurred to the second, third and fourth causes of action set forth in the plaintiffs' amended complaint.

DECISION ON DEMURRER TO SECOND CAUSE OF ACTION:

The plaintiffs' second cause of action, in essence, alleged a denial of equal protection as afforded to the plaintiffs by the 14th Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin. In addition to incorporating the facts set forth in paragraphs 1 through 10 of the amended complaint, the second cause of action states in paragraph 12:

> "12. Certain teachers who appeared before the Board without representation by the Association, have been treated differently from the employees who appeared before the Board represented by the Association. Said teachers who appeared before the Board without representation were offered employment opportunities and conditions of employment not offered to the teachers who were represented by the Association before the Board."

To this cause of action the defendants have demurred on the ground that sufficient facts are not stated to constitute a cause of action.

The umbrella of equal protection covers a limitless number of situations and as such is incapable of a single precise definition. However, equal protection can be defined in the following general language:

> "It has been repeatedly said that the guaranty of the

> equal protection of the law means that no person or class of person shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty, and property and in pursuit of happiness." 16 Am Jur 2nd Constitutional Law Sec. 87, p. 848

As this Court views the plaintiffs' second cause of action it is alleged therein that certain teachers who appeared before the Hortonville Board of Education were offered employment opportunities not offered to teachers who were represented by the Hortonville Education Association. The Court in Griffin vs. County School Board of Prince Edward County, 377 U.S. 218, 230, 84 S. Ct. 1226, 1233, 12 L. Ed. 256 (1964):

> "Indeed, showing that different persons are treated differently is not enough, without more, to show a denial of equal protection."

This Court in considering a demurrer must liberally contrue the pertinent portions of the plaintiffs' amended complaint and give the plaintiffs the benefit of all reasonable inferences which can be drawn from the properly pleaded facts. Continental Bank and Trust Co. vs. Akwa (1973), 58 Wis. 2nd 376; 206 NW 2nd 174. Using the foregoing standard, this Court fails to find any facts set forth in the amended complaint which, if proven, would show that the teachers offered employment and those not offered employment were in like or similar circumstances, or that any distinction made between them by the Board of Education was for a constitutionally impermissible reason.

Therefore, this Court deems the plaintiffs not to have

stated a cause of action and the defendants' demurrer to the plaintiffs' second cause of action must be sustained.

DECISION ON DEMURRER TO THIRD CAUSE OF ACTION:

The plaintiffs' third cause of action is based on an alleged violation of Wisconsin's Open Meeting Law, Sec. 66.-77 of the Wisconsin Statutes. The pertinent paragraph with respect to the plaintiffs' third cause of action is paragraph 15 which alleges:

> "15. On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The foregoing allegation clearly demoninates the meeting of April 2, 1974 as one at which the Hortonville Board of Education considered the employment and dismissal of the members of the plaintiff class. In addition, the April 2, 1974 meeting was held after the disciplinary hearings held on April 1, 1974 as set forth in earlier portions of the plaintiffs' complaint. The Statute in question recognizes that it is in the public's interest to have governmental affairs conducted within the public's view and therefore provides for many types of open governmental meetings. However, there are six exceptions to that policy and two of those exceptions are pertinent to this case. Sec. 66.77(3) provides in part:

> "(a) Deliberting after judicial or quasi judicial trial or hearing.

> (d) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employee or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employee or the person charged, investigated or otherwise under discussion."

The meeting of April 2, 1974 as set forth in the plaintiffs' complaint clearly falls within the aforementioned exceptions. The meeting was held subsequent to a quasi-judicial hearing and the employment or dismissal of the plaintiff class was decided at that particular meeting. If the plaintiff class had wanted such a meeting to be open to the public they need have only requested the same as provided in Sec. 66.77(3)(b). The complaint does not allege that the plaintiff class made such a request for an open meeting.

Therefore this Court deems the plaintiffs not to have stated a cause of action and the defendants' demurrer to the plaintiffs' third cause of action must be sustained.

DECISION ON DEMURRER TO FOURTH CAUSE OF ACTION:

The plaintiffs base their fourth cause of action on a theory that replacement teachers hired by the Hortonville Board of Education were hired in violation of Secs. 118.-19, 118.21 and 118.25 of the Wisconsin Statutes. With respect to the fourth cause of action there are two pertinent paragraphs:

> "18. On information and belief, the Board, its administrators and agents, have hired, and are hiring

permanent replacement for the plaintiffs and other teachers similarly situated, for both the 1973-1974 and 1974-1975 school years. It is the intention of the Board, its administrators and agents to hire permanent replacements for all plaintiffs and others similarly situated."

"19. On information and belief, said permanent replacements have been hired, and are being hired, in violation of Sections 118.19, 118.21 and 118.25, Wis. Stat. Said hirings, and the teaching contracts entered into between the Board and the permanent replacements, are in violation of the Wisconsin Statutes, and they are null and void."

Section 118.19 Stats. sets forth the requirements for teachers' certificates and licenses. Section 118.21 Stats. requires individual written contracts between teachers and school boards together with related items such as compensation, filing of a statement showing the date of expiration, and the grade character of certificate or license held, travel expenses and educational conventions. Sec. 118.25 Stats. provides for required health examinations of various school personnel.

The foregoing statutes are written in precise detail but when looking at the plaintiffs' fourth cause of action as alleged in the amended complaint this Court is unable to find any facts similarly detailed. There is absolutely no factual basis whatsoever set forth in the plaintiffs' fourth cause of action to support the conclusion that the foregoing statutes have been violated.

Accordingly the demurrer to the plaintiffs' fourth cause of action must be sustained.

Inasmuch as leave will be granted to replead the fourth cause of action, this Court in view of possible proper factual allegations at a future date deems it premature to decide whether there is a defect of parties as was raised by the demurring defendants.

SUMMARY:

(1) The demurrer to the plaintiffs' second cause of action in the amended complaint must be sustained. The plaintiffs are granted leave to re-plead their second cause of action within ten (10) days upon payment of $50.00 costs.

(2) The demurrer to the plaintiffs' third cause of action in the amended complaint must be sustained. No leave is granted to replead this cause of action.

(3) The demurrer to the plaintiffs' fourth cause of action in the amended complaint must be sustained. Leave is granted to replead this cause of action, without additional costs.

Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

BY THE COURT:

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

Case No. 17291

The above entitled action having been heard on the 27th day of June, 1974, by the court at the courthouse in the City of Appleton, on motion of Jack D. Walker, one of the attorneys for defendants, for summary judgment for the defendants; and the defendants appearing by their attorneys, Jack D. Walker and James K. Ruhly, of Melli, Shiels, Walker & Pease, S.C., in support of said motion, and plaintiffs appearing by their attorney, Bruce F. Ehlke, of Lawton & Cates, in opposition to said motion, and the court having heard the arguments of counsel and having read and considered the affidavit of Roger Weihing in support of said motion and the affidavit of Michael Wisnoski in opposition thereto; and the court further having reviewed and considered the briefs submitted by counsel; and the court having filed a Decision On Defendants' Motion For Summary Judgment To First Cause Of Action on July 19, 1974;

IT IS ORDERED That the motion of the defendants for summary judgment pursuant to Section 270.635, Wisconsin Statutes, be, and the same hereby is, granted; and that judgment be entered for the defendants and against the plaintiffs dismissing the First Cause of Action of the plaintiffs on its merits with prejudice, and for defendants' costs and taxable disbursements herein.

Dated this 26th day of July, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER SUSTAINING DEMURRERS TO SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION AND FOURTH CAUSE OF ACTION

Case No. 17291

The above entitled matter having been heard on the 27th day of June, 1974, pursuant to demurrers brought by defendants alleging that the second, third and fourth causes of action of the plaintiffs' amended complaint do not state facts sufficient to constitute causes of action; and the plaintiffs appearing by their attorney Bruce F. Ehlke, of Lawton & Cates; and defendants appearing by their attorneys, Jack D. Walker and James K. Ruhly, of Melli, Shiels, Walker & Pease, S.C.; and the Court having heard the arguments of counsel, and briefs having been submitted to the Court and the Court having reviewed said briefs; and the Court having filed a Decision On Demurrers To Second, Third and Fourth Causes Of Action on July 19, 1974;

IT IS ORDERED That the demurrer to the second cause of action in the amended complaint be and hereby is sustained, and plaintiffs are granted leave to re-plead said second cause of action within ten (10) days from July 19, 1974, upon payment of $50.00 costs to defendants.

IT IS FURTHER ORDERED That the demurrer to the third cause of action in the amended complaint be and hereby is sustained, without leave to re-plead said cause of action.

IT IS FURTHER ORDERED That the demurrer to the fourth cause of action in the amended complaint be and hereby is sustained, and plaintiffs are granted leave to re-plead said fourth cause of action within ten (10) days from July 19, 1974, without additional costs.

Dated this 26th day of July, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

JUDGMENT DISMISSING FIRST CAUSE OF ACTION

The motion of the defendants in the above entitled action for summary judgment to first cause of action in amended complaint, for the defendants and against the plaintiffs, pursuant to Section 270.635, Wisconsin Statutes, having been duly heard and considered, and said motion having been granted by the Court,

NOW THEREFORE, on motion of Jack D. Walker, one of the attorneys for the defendants,

IT IS ADJUDGED, That the defendants have judgment dismissing the first cause of action of the plaintiffs on its merits and with prejudice and for its costs and taxable disbursements herein as follows:

Costs: $100.00
Taxable Disbursements: $573.01

Dated August 27, 1974.

BY THE COURT:

/s/ RUTH H. JANSSEN
Deputy Clerk

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF ENTRY OF JUDGMENT
Case No. 17291

TO: Attorney Bruce F. Ehlke
Lawton & Cates
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Plaintiffs

PLEASE TAKE NOTICE That a judgment of which a true and correct copy is hereto attached, was signed by the Deputy Clerk of Court, Ruth H. Janssen, on the 27th day of August, 1974 and duly entered in the Circuit Court for Outagamie County, Wisconsin, on the 27th day of August, 1974.

Dated at Madison, Wisconsin, this 28th day of August, 1974.

JAMES K. RUHLY
MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants

[Caption omitted in printing]

JUDGMENT DISMISSING FIRST
CAUSE OF ACTION

The motion of the defendants in the above entitled action for summary judgment to first cause of acton in

amended complaint, for the defendants and against the plaintiffs, pursuant to Section 270.635, Wisconsin Statutes, having been duly heard and considered, and said motion having been granted by the Court,

NOW THEREFORE, on motion of Jack D. Walker, one of the attorneys for the defendants,

IT IS ADJUDGED, That the defendants have judgment dismissing the first cause of action of the plaintiffs on its merits and with prejudice and for its costs and taxable disbursements herein as follows:

Costs: $100.00
Taxable Disbursements: $573.01

Dated August 27, 1974

BY THE COURT:

/s/ RUTH H. JANSSEN
Clerk

STATE OF WISCONSIN
IN SUPREME COURT

STATE ex rel HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, on behalf of themselves and all other similarly situated petitioners,

Petitioners,

vs.

CIRCUIT COURT FOR OUTAGAMIE COUNTY, ALLAN J. DEEHR, CIRCUIT JUDGE, PRESIDING: HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH, and RONALD SURPRISE, individually and as officers and members of the BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of HORTONVILLE JOINT SCHOOL DISTRICT NO. 1,

Respondents.

VERIFIED PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR DECLARATORY JUDGMENT, A WRIT OF PROHIBITION, MANDAMUS, OR OTHER APPROPRIATE RELIEF

The petitioners, by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS by ROBERT H. FRIEBERT, hereby allege as follows:

1. That the petitioner, the HORTONVILLE EDUCATION ASSOCIATION, is a teachers' union which, prior to March 18, 1974 was the duly qualified representative and bargaining agent for all teachers under contract with the Respondent, the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1.

2. That the petitioner, MICHAEL WISNOSKI, is a qualified teacher, duly certified as such by the State of Wisconsin, who was, prior to April 2, 1974, a teacher under contract with the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, and that he has been determined to be a proper representative of a class of teachers similarly situated in a decision by the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, Allan J. Deehr, Circuit Judge, Presiding, dated July 19, 1974. See Exhibit A.

3. That the class above referred to contains eighty-eight (88) members who are all teachers certified by the State of Wisconsin and who were, prior to April 2, 1974, employed by the respondent HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; that because the said class is so numerious, joinder of all members is impracticable; that there are questions of law and fact common to the class; that the claims of the representative, MICHAEL WISNOSKI, are typical of the claims of the class; that the representative, MICHAEL WISNOSKI, will fairly and adequately protect the interests of the class; that the respondents have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with repect to the class as a whole; that the questions of law and fact common to the members of the class predominate over any

questions affecting only individual members; and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. That the respondent, through Circuit Judge Allan J. Deehr, is the CIRCUIT COURT FOR OUTAGAMIE COUNTY and, as such, entertained jurisdiction over a suit entitled HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, et al, plaintiffs v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al, defendants.

5. That the respondent HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, is ta territorial unit for school administration existing pursuant to Chapter 115-121, Wis. Stats.

6. That the respondent, BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, is the School Board or Board of Education in charge of the schools of the Hortonville Joint School District No. 1 pursuant to Chapter 115-121, Wis. Stats.

7. That the respondents, ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE are the officers and members of the aforesaid BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1.

8. That the respondents, MARVIN OBRY, ROBERT KOHLS and GENE RIEDL are the administrators of the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 and act as the administrative heads of the school district pursuant to Chapter 115-121, Wis. Stats.

9. That the subject matter of this lawsuit is generally known as the Hortonville strike which is a matter of statewide concern and interest.

10. For purposes of this petition, your petitioners do not dispute any of the facts of this case as contained in the two decisions of the respondent, Judge Deehr, dated July 19, 1974, copies of which are attached as Exhibits A and B and incorporated herein by reference.

11. That, briefly summarized, the facts are as follows:

(a) Commencing at some time prior to March 18, 1974, the petitioners and the respondents other than the Circuit Court for Outagamie County, engaged or attempted to engage in collective bargaining to reach a collective bargaining agreement pursuant to Wisconsin law.

(b) The parties were unable to agree upon a collective bargaining agreement.

(c) Your petitioners were of a belief that the reason for the failure to reach an agreement was because the respondents other than the Circuit Court of Outagamie County, refused to bargain in good faith and that the respondents other than the Circuit Court for Outagamie County were attempting to destroy the effectiveness of the petitioner, Hortonville Education Association, in violation of Sec. 111.70(3), Wis. Stats. The respondents, other than the Circuit Court for Outagamie County, deny that they refused to bargain in good faith or that they were attempting to destroy the effectiveness of the petitioner, Hortonville Education Association.

(d) In response to their beliefs that the respondents other than the Circuit Court for Outagamie County were engaging in prohibited practices, the petitioners as represented by Michael Wisnoski commenced a strike on March 18, 1974.

(e) Subsequent to March 18, 1974, any teacher employed by the respondents other than the Circuit Court for Outagamie County who disassociated himself from the petitioners was offered terms and conditions of employment with the Hortonville Joint School District No. 1.

(f) The respondents other than the Circuit Court for Outagamie County at no time sought judicial intervention to enforce Sec. 111.70 (3) (1), Wis. Stats. which prohibits strikes by municipal employees and thus, no impartial, detached and neutral decisionmaker was ever asked to in any way enjoin the strike.

(g) On April 2, 1974, the Hortonville Board of Educaction terminated the employment of all members of the plaintiff class who remained associated with the Hortonville Education Association.

(h) Hearings preceded these firings and these hearings were conducted by the respondent, Board of Education of Hortonville Joint School District No. 1.

(i) At this hearing, your petitioners challenged the impartiality of the respondent, Board of Education of Hortonville Joint School District No. 1, to conduct disciplinary hearings because it was a combatant in this dispute. This objection was denied.

(j) The petitioners attempted to assert at this disciplinary hearing for purposes of defense and/or for purposes of mitigation of penalty that this dispute was caused by the intransigence of their judges. Your petitioners attempted to do this by calling the individual respondents as witnesses. Said request and said defenses were denied by the respondent, Board of Education, and your petitioners were all found guilty and fired forthwith.

(k) The sole basis for the disciplinary action and firing was the fact that your petitioners had engaged in a strike.

12. That your petitioners brought several causes of action against all of the respondents other than the CIRCUIT COURT FOR OUTAGAMIE COUNTY before the respondent CIRCUIT COURT FOR OUTAGAMIE COUNTY, and, in those causes of action asserted, inter alia, the following:

(a) That municipal employees can strike if there is just cause for the strike, such as the refusal of the municipal employer to bargain in good faith or that the employer is attempting to destroy the union which represents the employees.

(b) That the respondent, Board of Education of Hortonville Joint School District No. 1, was not an impartial, neutral and detached decisionmaker to determine whether your petitioners should be subjected to disciplinary action because they allegedly engaged in a strike.

(c) That the respondent, Board of Education of Hortonville Joint School District No. 1, is not an impartial, neutral and detached decisionmaker to determine the punishment which should be meted out to any person who is found by them to have engaged in a strike because they were a combatant in this dispute.

(b) That the respondent, Board of Education of Hortonville School District No. 1, violated the petitioners' rights to equal protection of the law because they fired all persons who were represented by the attorneys for the petitioner, Hortonville Education Association, while at the same time offered employment opportunities and conditions of employment to persons who had formerly associated themselves with your petitioner, Hortonville Education Association, but who had subsequently disassociated themselves from the petitioner, Hortonville Education Association.

13. That the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, in two decisions dated July 19, 1974 (Exhibits A and B) ruled as follows:

(a) There can be no just cause for a strike by municipal employees.

(b) The respondent, Board of Education of Hortonville Joint School District No. 1, was an appropriate hearing body because there was no defense to the action of striking and, therefore, any bias on the part of the respondent, Board of Education of Hortonville Joint School District No. 1, was irrelevant.

(c) That the mere fact that the respondent, Board of Education of Hortonville Joint School District No. 1,

treated teachers who were associated with the petitioner, Hortonville Education Association, differently than the way it treated persons who were formerly associated with the Hortonville Education Association did not present a sufficient allegation of a denial of equal protection of the laws.

14. That your petitioners ask for a declaration and the entry of appropriate orders with respect to the following:

(a) That Sec. 111.70(1), Wis. Stats. which ostensibly prohibits strikes by all county or municipal employees constitutes a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that the legislative grouping of all municipal and county employees into one class without regard to the function and relationship of the employees to the health and safety of the community constitutes an improper classification vis a vis the purposes sought to be achieved by this legislation and that your petitioners are not employed in any capacity which has any bearing upon the health and safety of the people of Hortonville.

(b) That in any event, municipal employees can engage in a strike if it is in response to prohibited practices on the part of the municipal employer and, municipal employees can assert such defense before an impartial, neutral and detached decisionmaker.

(c) If it is determined that municipal employees can be absolutely prohibited from striking and that there was no just cause for the strike, then your petitioners are entitled to a determination of penalty by an inde-

pendent, neutral and detached decisionmaker and the penalty to be imposed is not necessarily firing from employment but, this decisionmaker has a wide variety of available penalties which it may impose, including, no penalty, warning, reprimand, suspension and firing.

(d) That the respondent, Hortonville Joint School District No. 1, is not an independent, neutral and detached decision maker with respect to determining whether any of the petitioners engaged in a prohibited activity and, therefore, your petitioners have been denied a decision which comports with due process and equal protection of the laws as guaranteed by the Fourteenth Amendment.

(e) That the Board of Education of Hortonville Joint School District No. 1 was not an independent, neutral and detached decisionmaker to determine the penalty, if any, to be imposed upon any of your petitioners in violation of rights guaranteed to your petitioners by the Fourteenth Amendment to the United States Constitution.

(f) That the action of the respondent, Board of Education of Hortonville Joint School District No. 1, in treating persons who had struck who were not represented by the petitioner, Hortonville Education Association, more favorably than persons who were presented by the petitioner, Hortonville Education Association, constitutes a violation of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution as well as constituting a violation of Sec. 111.70(3)(a), Wis. Stats.

(g) That Sec. 111.70(j)(m), Wis. Stats. which provides for binding arbitration for resolution of municipal labor disputes involving members of the Milwaukee Police Department constitutes a discriminatory class and denies to your petitioners due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that your petitioners who are municipal employees who are not involved with the health and safety of the community of Hortonville are denied the benefits of compulsory arbitration and, at the same time are denied the right to strike.

15. That the issues which were presented to the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, were more numerous than the ones presented here, some issues presented here were not presented below, and, an appeal will come too late for effective redress of these grievances and will be inadequate for the school year of 1974-1975 and there is a need for immediate intervention by this Court to avoid great hardship and the effective denial of the rights guaranteed to the petitioners as asserted in this petition and there is presented questions of great and immediate public concern.

WHEREFORE, your petitioners and the class represented by your petitioners respectfully request that this Court enter an appropriate order directing the respondents to show cause why this Court should not grant the petitioners' request for original jurisdiction and the petitioners' re-

quest for the declaration of rights and entry of appropriate orders and writs to effectuate the decision of this Court.

SAMSON, FRIEBERT, FINERTY & BURNS
Attorneys for Petitioners

[Exhibits A and B omitted, printed at pages A-172-A-203 and A- 203-A-209 of this Appendix]

[Verification omitted]

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted in printing]

ORDER TO SHOW CAUSE

Upon the petition of HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, by their attorneys, SAMSON, FRIEBERT, FINERTY & BURNS, by ROBERT H. FRIEBERT,

IT IS ORDERED:

That the respondents and each of them appear and show cause, if any they have, on the 23rd day of September, 1974 at 11 o'clock in the forenoon as to why this Court should not grant said petition and take original jurisdiction in this action.

Let a copy of this order and the petition be served upon all of the respondents and the Attorney General of the State of Wisconsin pursuant to Sec. 269.56(11), Wis. Stats. no later than the 16 day of September, 1974.

Dated at Madison, Wisconsin this 10th day of September, 1974.

/s/ HORACE W. WILKIE
Chief Justice
Wisconsin Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted]

ORDER

The Order to Show Cause as to why this Court should not take jurisdiction in the original action proposed by petitioners herein having come on for hearing before the Court on September 23, 1974.

And it appearing that the time for appeal in the related matter of Hortonville Education Association and Michael Wisnoski et al v. Hortonville Joint School District No. 1 et al, has not expired,

IT IS ORDERED that if an appeal is taken from the trial court's determination in that case, it shall be filed and perfected in this Court on or before October 15, 1974, and upon such filing appellants' brief shall be served and filed on or before October 21, 1974, respondents' brief shall be served and filed on or before November 18, 1974, appellants' reply brief shall be served and filed on or before November 27, 1974, and that appeal will be assigned for oral argument during the December call. All of the briefs shall be served and filed in typewritten form to be followed by printed briefs.

IT IS FURTHER ORDERED that the petition for original action herein is denied.

Dated at Madison, Wisconsin, this 24th day of September, 1974.

BY THE COURT
/s/ ROBERT O. UEHLING
Robert O. Uehling
Clerk of Supreme Court

(SEAL)

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

HORTONVILE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Defendants.

NOTICE OF APPEAL

TO: CLERK OF CIRCUIT COURT
Outagamie County Courthouse
Appleton, Wisconsin 54911

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys at Law
309 Insurance Building
Madison, Wisconsin 53703
Attorneys for Defendants

PLEASE TAKE NOTICE that the plaintiffs above named, by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS, hereby appeal from the following particular aspects of the judgment entered against them in the above captioned case, notice of entry of judgment having been received on August 28, 1974:

(a) That portion of the judgment granting the defendants' Motion for Summary Judgment as to the First Cause of Action in the plaintiffs' Amended Complaint;

(b) That portion of the judgment sustaining the defendants' Demurrer to the Third Cause of Action in the plaintiffs' Amended Complaint.

Dated at Milwaukee, Wisconsin this 10 day of October, 1974.

SAMSON, FRIEBERT, FINERTY & BURNS
By /s/ ROBERT H. FRIEBERT
Attorneys for Plaintiffs

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,

Respondents.

OPINION OF WISCONSIN SUPPREME COURT

APPEAL from a judgment and an order of the circuit court for Outagamie county: ALLAN J. DEEHR, Circuit Judge of the Fourth circuit, Presiding. Judgment reversed, order affirmed.

This is a class action which grew out of a municipal labor dispute at Hortonville, Wisconsin, involving on one side the public school teachers in the Hortonville Joint School District No. 1 and their representative and bargaining agent, the Hortonville Education Association (HEA), and on the other side the Hortonville Joint School District No. 1 and its representative and bargaining agent, the Board of Education of Hortonville Joint School District No. 1.

The labor dispute began in January, 1974, over the 1973-1974 and the 1974-1975 teachers' contracts. Collective bargaining did not resolve the dispute and in March, 1974, a substantial number of teachers engaged in a strike. The school board discharged over 80 teachers represented by the appellant HEA. This action was commenced to declare

the action of the school board null and void and for reinstatement of the teachers.

The trial court granted the school board's motion for summary judgment as to the teachers' first cause of action and sustained the demurrers to the other three causes of action.

The appellants Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond are teachers who were discharged by the board and represent all former Hortonville teachers similarly situated. Respondents Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise are members of the school board. Respondent Robert Kohls is the Hortonville High School principal. Respondent Eugene Riedl is the Hortonville Junior High School and Elementary School principal. Respondent Marvin Obry is superintendent of the district.

The material facts, as they appear from the pleadings, the affidavits and other documents filed in support of and in opposition to the motion for summary judgment, are not in dispute. In January, 1974, negotiations between the HEA and the school board were in progress to reach a collective bargaining agreement on 1973-1974 and 1974-1975 teaching contracts. From about January 24 to January 30, the HEA engaged in "informational picketing," which did not interrupt any teaching activities. On Monday, March 18, the teachers went on strike. On March 20, the school district superintendent, at the direction of the board, sent letters to the teachers inviting them to return to their jobs. Several teachers did return on Friday, March 22d.

On March 23rd, the superintendent, again at the direction of the board, sent a letter to each teacher again inviting

them to return to work and advising them that strikes by public employees were illegal and that the board would not "condone unlawful activity" by its employees. None of the 86 teaching employees then on strike returned to work in response to said letter. On Tuesday, March 26th, and Wednesday, March 27th, classes were conducted for most students through the use of substitute teachers.

At a special school board meeting on Friday, March 29th, the board decided to schedule disciplinary hearings for each individual teaching employee then on strike. Notices[1] of the individual hearings were addressed to each teaching employee and specified the purpose of the hearing and the time at which he or she was to appear. The hearings, which were scheduled twenty minutes apart, were to be held on Monday, April 1, Tuesday, April 2, and Wednesday, April 3. The notices were delivered to the Outagamie county sheriff's department on Friday, March 29th, with a request that they be served as soon as possible. Twenty-three of the notices were served on Friday, March 29th, forty-four were served on Saturday, March 30th, twenty on Monday, April 1st,

[1]"The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

"You have breached your individual employment contract;

"You have engaged in an unlawful strike contrary to Wisconsin law.

"This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

"You are hereby notified that the Board of Education has set a hearing on this matter for ——, April —, 1974, at — o'clock in the —— noon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

"At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

"Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate."

and one on Tuesday, April 2d. The HEA was not notified of the hearing.

On Monday morning, April 1st, almost all the teaching employees represented in this class action appeared before the board en masse with their retained counsel and indicated, through him, that they would refuse to answer questions that they did not want individual hearings but rather preferred to be treated as a group. Their counsel also objected, on due process grounds, that the teaching employees did not receive fair notice of the hearings and that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was allowed to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m.

On Tuesday morning, April 2d, counsel for the teachers appeared before the board with four other teaching employees who had not appeared the previous day. These individuals all indicated that they took the same position as the other teachers and wished to be considered with the others.

On Tuesday afternoon, April 2d, the board held a special meeting at which it adopted a resolution terminating the employment of the teachers in the class represented by appellants here. Letters were sent to such teachers indicating that their employment was terminated and that their offers

of employment or contracts for the 1974-1975 school year were revoked or terminated.[2]

On April 5th the board held a hearing for a teacher who had erroneously been excluded from all prior action and proceeding. The teacher, through the counsel who represented the other teachers, indicated she wished to take the same position as the others, and was therefore discharged.

Thereafter, the board began hiring replacement teachers and school reopened on April 8, 1974. Only one of the discharged teachers reapplied for employment and he was rehired.

In the first cause of action in their amended complaint, the plaintiffs-appellants, the HEA and the named teachers-plaintiffs as class representatives, alleged that the circumstances of the hearing and discharge constituted a deprivation of their property and liberty without due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution and art. I of the Wisconsin Constitution. In the third cause of action, the appellants alleged that conduct of the board on Tuesday afternoon, April 2d, constituted a violation of the open meeting law, sec. 66.77, Stats. The appellants sought, as relief, a declaration that the board's action was null and void, an order that the discharge of the teachers be set aside, an injunction proscribing the

[2]"Please be advised that the Board of Education met on April 2, 1974, and took the following action:

"The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 19, 1974:

"You breached your individual employment contract;

"You engaged in strike activity contrary to Wisconsin law.

"Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furtheremore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

"The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You shou'd contact Superintendent Obry or a principal if you wish to so apply."

board from hiring additional replacements, an order that the contracts of the replacements be rescinded, an order requiring the parties to select an impartial decisionmaker to determine whether there was "just cause" for the discharge, and such other relief as might be appropriate.

The trial court granted the respondent-school board's motion for summary judgment on the first cause of action and sustained its demurrer to the third. The other causes of action stated in the amended complaint are not at issue here.

The plaintiffs appeal from the judgment and order.

BEILFUSS, J. The issues in this court are:

1. Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

2. Does the action by the Hortonville school board in discharging teachers instead of obtaining a judicial order constitute selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws?

3. Does the state's prohibition against strikes by teachers, without provision for binding arbitration and de novo review of reasonableness of punishment, when such benefits are provided for other public employees, constitute a viola-

tion of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

4. Were the strikers denied due process of law because they were discharged by the Hortonville school board which is not a neutral, impartial and detached decisionmaker?

5. Did the action taken by the Hortonville board of education constitute a violation of the open meeting law?

The general rule is that issues not presented to the trial court will not be considered for the first time on appeal. Estate of Scherffius (1974), 62 Wis. 2d 687, 696, 697, 215 N.W. 2d 547; Resseguie v. American Mut. Liability Ins. Co. (1971), 51 Wis. 2d 92, 103, 104, 186 N.W. 2d 236. With respect to constitutional issues, this court had said it may, in its discretion, consider such issues for the first time on appeal if it is in the interest of justice to do so and there are no unresolved factual issues. State v. Morales (1971), 51 Wis. 2d 650, 654, 187 N.W. 2d 841; Bradley v. State (1967), 36 Wis. 2d 345, 359, 359a, 153 N.W. 2d 38, 155 N.W. 2d 564. We believe, in this case, it is in the interest of justice to consider the issues raised as set forth above.

Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

As to all municipal employees, sec. 111.70 (4) (1), Stats., provides:

"Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

As to state employees, sec. 111.89, Stats., provides:

"Strike prohibited. (1) Upon establishing that a strike is in progress, the employer may at his option either seek an injunction or file an unfair labor practice charge with the

commission under s. 111.84 (2) (e) or both. In this regard it shall be the responsibility of the department of administration to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.

"(2) The occurrence of a strike and the participation therein by a state employe do not affect the rights given to the employer to deal with the strike, including:

"(a) The right to impose discipline, including discharge, or suspension without pay, of any employe participating therein;

"(b) The right to cancel the reinstatement eligibility of any employe engaging therein; and

"(c) The right of the employer to request the imposition of fines, either against the labor organization or the employe engaging therein, or to sue for damages because of such strike activity."

The appellants contend that since employers of state employees are specifically given the right to discharge in the event of a strike, while no similar provision applies to municipal employees, that municipal employees are not allowed to discharge striking employees but are restricted to the remedy of injunction.

The respondents cite Millar v. Joint School Dist. (1957), 2 Wis. 2d 303, 312, 86 N.W. 2d 455, for the proposition that:

"A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause. . . . If a teacher fails to perform his duties

under his contract, the board may discharge him from further service."

They further contend that sec. 111.70 (4) (1), Stats., in no way diminishes that right. We believe they are correct in that contention. Sec. 118.22 (2) provides:

"On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board."

The reference to the fact that a teacher may be "dismissed" clearly indicates the existence of the right to discharge. Both Millar, supra, and Richards v. Board of Education (1973), 58 Wis. 2d 444, 460b, 206 N.W. 2d 597, indicate clearly that the term "dismiss" means to remove from employment and not to merely refuse to renew a contract.

Furthermore, the power of the board to discharge a teacher for "just cause" is clearly preserved in the master contract[3] between HEA and the school district.

From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike.

The appellants contend the action by the Hortonville school board in discharging the teachers instead of obtaining a judicial order constitutes selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws as guaranteed by the state and federal constitutions.

The appellants argue that this is the first known instance in Wisconsin where striking teachers have been discharged. They assert that the usual procedure is for the school board to seek an injunction, and that the deviation from this practice in this case amounts to selective enforcement of the law and a denial of equal protection.

The respondents, in argument, deny this is the first instance of discharge because of strike activity. They also urge that there is an unresolved factual dispute involved, i.e., what is the normal procedure in the case of teacher strikes. For the purpose of this opinion, we will assume the factual allegation of the appellants is correct.

Several factors bear on the question of whether the discharge amounted to a denial of equal protection due to selective enforcement of the law. The basic question that must be answered in the affirmative before a denial of equal protection can be found is whether a difference in treatment

[3]The master agreement, while contained in the record at pages 214-225, was not part of or appended to either of the affidavits filed with respect to the motion for summary judgment. However, because we have decided to determine the issues raised upon appeal, this document should be considered.

amounts to invidious discrimination. Harper v. Virginia Board of Elections (1966), 383 U.S. 663, 666, 86 Sup. Ct. 1079, 16 L. Ed. 2d 169.

Arguably at least, there were other remedies the school board could have pursued. It could have sought an injunction, it could have sought fact-finding and mediation before the Wisconsin Employment Relations Commission,[4] it could have continued collective bargaining or it could have discharged the teachers for violating the statutory prohibition against public employee strikes as was done here. The fact that the school board pursued one of the remedies does not ipso facto mean the teachers were denied equal protection. This is especially true in this case because we do not have a record which reveals all the pertinent and relevant facts upon which the board acted. What might be a fair and reasonable response on the part of the board might not be under a different factual background. Further, the right to discharge here is essentially contractual. Whether the master contract between the board and the school district and the contracts between the individual school teachers and the districts are comparable cannot be determined from the record in this case.

With one exception not material here, all of the striking teachers were treated the same. They were all given the same notices, all had the same opportunity to be heard, all were discharged and all given the right to apply for reinstatement. The record does not reveal invidious discrimination and no denial of equal protection appears.

The appellants also contend that they were denied equal protection of the law in two additional respects: First, in that they are denied the right to strike, contrary to their counter-

[4]Sec. 111.70, Stats. *See also, Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 151 N.W. 2d 617.

part in the private sector; and, second, in that they are denied certain benefits, e.g., binding arbitration, which are accorded to other public employees, i.e., police and firemen.

Absent a suspect classification or a fundamental right, neither of which are involved in this case,[5] this court has held that:

". . . to declare an act of the legislature as to a classification violative of the equal-protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt." State ex rel. La Follette v. Reuter (1967), 36 Wis. 2d 96, 111, 153 N.W. 2d 49. See also, Wiener v. J. C. Penney Co. (1974), 65 Wis. 2d 139, 147, 222 N.W. 2d 149.

There is a strong presumption of constitutionality which attaches to acts of the legislature, unless the court can say that no statement of facts can reasonably be conceived that would sustain it. Wiener, supra, page 147; State ex rel. Hammermill Paper Co. v. La Plante (1973), 58 Wis. 2d 32, 46, 205 N.W. 2d 784. Only if a classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection. Simanco, Inc. v. Department of Revenue (1973), 57 Wis. 2d 47, 57, 203 N.W. 2d 648. In Wiener, supra, page 147, this court reiterated five standards necessary for a proper classification:

"(1) All classifications must be based upon substantial distinctions which make one class really different from another.

[5]*See Warshafsky v. The Journal Co.* (1974), 63 Wis. 2d 130, 216 N. W. 2d 197; *United Federation of Postal Clerks v. Blount* (D.C. D.C. 1971), 325 Fed. Supp. 879, affirmed (1971), 404 U.S. 802, 92 Sup. Ct. 80, 30 L. Ed. 2d 38.

"(2) The classifications adopted must be germane to the purpose of the law.

"(3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.

"(4) To whatever class a law may apply, it must apply equally to each member thereof.

"(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." See also, Dane County v. McManus (1972), 55 Wis. 2d 413, 423, 198 N.W. 2d 677; State ex rel. Ford Hopkins Co. v. Mayor (1937), 226 Wis. 215, 222, 276 N.W. 311.

Considering appellants' contentions in reverse order, they claim that teachers are denied equal protection because, unlike police and firemen, they are not accorded binding arbitration[6] or other dispute settlement rights. The different treatment accorded police and firemen is "based upon substantial distinctions which make no class really different from another." Wiener, supra, page 147. It is not difficult to find a rational basis for the legislation. If police or firemen go on strike the imminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job as soon as possible, or to prevent them from striking in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function.

[6]*See* secs. 111.70 (4) (jm) and 111.77, Stats.

A more difficult question arises with respect to the appellants' contention that they are denied equal protection, vis-a-vis nonpublic employees, by the application of the strike ban contained in sec. 111.70 (4) (l), Stats.

Several rationales are typically propounded in support of no-strike laws for public employees. One relies on the sovereignity of the governmental employee and reasons that the government, unlike the private employee, cannot suspend operations nor go out of business nor increase its budgets, and therefore, is entitled to expect a higher level of devotion to service. Norwalk Teachers' Assn. v. Board of Education (1951), 138 Conn. 269, 83 Atl. 2d 482. Another rationale is that the peculiar nature of the government, as opposed to private employers, makes it particularly vulnerable to the strike.

". . . In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of non union competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shutdown of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units of groups of strategically located public employees. Unhampered by such market restraints, a union that can exert heavy pressure through a strike may be able to obtain excessive

wages and benefits." Cox and Bok, Labor Law (7th ed), pages 970, 971.

An additional rationale is that public employees have adequate opportunity to achieve their aims through the legislative process. Note: The Strike and Its Alternatives in Public Employment, 1966 Wisconsin Law Review, 549, 556. It is also often stated that the strike ban protects the public health, safety and welfare.

The position of the appellants is that neither these nor any other rationales can support the validity of the strike ban, at least with respect to them. They concede, of course, that a strike by police or firemen may result in real, immediate and irreparable harm to the community, and thus admit that the strike ban is valid as applied to those types of emergency services. They argue, however, that the statute is too broad in its scope.

Many courts have considered this issue and none have found a denial of equal protection. See: Annot. (1971), Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R. 3d 1147. As stated in United Federation of Postal Clerks v. Blount, supra, page 883:

"Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff argues that the provisions in question are unconstitutionally broad in covering all Government employees regardless of the type

or importance of the work they do, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as 'essential' or 'non-essential,' or whether similar jobs are performed by workers in private industry who do have the right to strike protected by statute. . . . The Equal Protection Clause, however, does not forbid all discrimination. Where fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961). . . ."

We conclude there is a meaningful distinction between governmental employees and nongovernmental employees. The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not unconstitutional as a denial of equal protection. If the no-strike ban legislatively imposed on public employees is to be abolished or altered, it must be done by the legislature and not the courts.

The teachers contend they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decisionmaker.

The Fourteenth Amendment to the United States Constitution provides, inter alia, that no state shall deprive any persons of property or liberty without due process of law. Before it can be determined whether the appellants were denied due process, it must be established that they were entitled to due process of law in that they were deprived of their property or liberty by state action.

State action is clearly present in this case. The Hortonville Joint School District No. 1 is organized under the laws of

the state of Wisconsin and is a municipal employer as defined in sec. 111.70, Stats. The school board is charged under chs. 118 and 120 with the management of the school district. The district, the board and their agents are therefore extensions of the state.

With respect to the question of deprivation of property, we refer to Board of Regents v. Roth (1972), 408 U.S. 564, 92 Sup. Ct. 2701, 33 L. Ed. 2d 548, and Perry v. Sindermann (1972), 408 U.S. 593, 92 Sup. Ct. 2694, 33 L. Ed. 2d 570. In Roth, the court decided that a nontenured assistant professor was not entitled to procedural due process when his one-year teaching contract was not renewed. The court stated:

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests — property interests — may take many forms.

". . .

". . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely on their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." Roth, supra, pages 576, 577.

In Perry, the court added:

"A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 A. Corbin on Contracts, secs. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' Id., at sec. 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' Ibid." Perry, supra, pages 601, 602. See also Pelisek v. Trevor State Graded School Dist. No. 7 (E.D. Wis. 1974), 371 Fed. Supp. 1064.

In Wieman v. Updegraff (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L. Ed. 216, the court held that professors removed from office during the terms of their contracts were entitled to due process. See also, Carpenter v. City of Greenfield School District No. 6 (E.D. Wis. 1973), 358 Fed. Supp. 220.

In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted

to a deprivation of property within the intendment of the due process clause.

The respondents contend that no deprivation of property is involved because the employees, by going on strike, abandoned whatever property interest they had in continued employment. Going on strike, the respondents argue, is the equivalent of quitting, a unilateral breach of the employment contract which dissolves any property interests for due process purposes.

It is unnecessary to reach the merits of this contention, however, because the argument begs the question. One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning. The teachers were deprived of a constitutional property right in this case.

Another question to be considered is whether the teachers were deprived of liberty. The United States Supreme Court in Roth, supra, pages 573, 574, stated:

"There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v.

Constantineau, 400 U.S. 433, 437. Wieman v. Updegraff, 344 U.S. 183, 191. . . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

"Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .' Joint Anti-Fascist Refugee Committee v. McGrath [341 U.S. 123] . . . at 185 (Jackson, J., concurring). . . ."

In Roth, there was no stated reason for the nontenured teacher not being rehired. In the case at bar, however, the stated reasons were two: (1) The teachers had breached their contracts, and (2) they had engaged in a strike contrary to Wisconsin law. It is apparent that such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges.

Having determined that the teachers were entitled to due process, the more difficult question of what process is due emerges. The often-quoted Cafeteria & Restaurant Workers Union v. McElroy (1961), 367 U.S. 886, 895, 81 Sup. Ct. 1743, 6 L. Ed. 2d 1230, provides:

". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Thus a balancing test must be established to weigh the interest of the school district in summary determination against the interests of the teachers in their continued employment. Only in light of that balancing test can it be determined whether the procedures afforded the teachers failed to satisfy the constitutional requirements of due process.

With respect to those procedures, the appellants allege their constitutional inadequacy in only one respect, i.e., the lack of an impartial decisionmaker.[7] The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. See Gibson v. Berryhill (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L. Ed. 2d 488; Ward v. Village of Monroeville (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L. Ed. 2d 267; Morissey v. Brewer (1972), 408 U.S. 471, 92 Sup. Ct. 2593, 33 L. Ed. 2d 484; Goldberg v. Kelly (1970), 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L. Ed. 2d 287. In Morrissey, involving

[7]The appellants do make brief reference to the alleged lack of timely notice, the failure of the board to present evidence against them, and the preclusion of the teachers from questioning members of the board or offering affirmative evidence. They do not argue these points, however, and the only issue raised regarding due process goes to the alleged lack of an impartial decisionmaker.

With respect to the lack of timely notice, it should be noted that although the longest notice received was four days, spanning a weekend, and the shortest was received on the day of the hearing; counsel for the teachers was asked at the hearing how much additional time he needed to prepare. Counsel replied that he would make an offer of proof and then let the board know if he needed more time. The offer was made but counsel never requested additional time thereafter.

the due process required to be afforded a parolee prior to revocation, the court stated:

"In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. Goldberg v. Kelly found it unnecessary to impugn the motives of the case worker to find a need for an independent decisionmaker to examine the initial decision." Morrissey, supra, pages 485, 486.

In Ward, supra, a case involving a situation where a city mayor was empowered to sit as judge to try ordinance violation cases, the fines from which constituted a significant part of the city's income, the court stated that the test was whether:

". . . [the] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . .' . . . ." Ward, supra, page 60.

It is important to note that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in Morrissey, supra, page 488:

"This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts. "The principle of fair play is an important factor in a consideration of due process of law." General Electric Co. v. Wisconsin Employment Relations Board (1958), 3 Wis. 2d 227, 241, 88 N.W. 2d 691; Durkin v. Board of Police & Fire Comm. (1970), 48 Wis. 112, 122, 180 N.W. 2d 1.

The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity.

This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law.

Respondents rely heavily on two cases, Arnett v. Kennedy (1974), 416 U.S. 134, 94 Sup. Ct. 1633, 40 L. Ed. 2d 15, and Johnson v. Board of Regents (W.D. Wis. 1974), 377 Fed. Supp. 227, to support their contention that there is no due process violation involved in this case. In Arnett, a federal employee was discharged by his immediate superior because the employee allegedly made disparaging remarks about such superior. The court held that whatever expectancy of continued employment, and hence property right, the employee had in his job was created by the Lloyd-La Follette Act (Act of Aug. 24, 1912, c. 389, sec. 6, 37 Stat. 555, now 5 U.S.C., sec. 7501), which provides in pertinent part at page 150:

" '[N]o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be

required except in the discretion of the officer making the removal; . . .' "

The three justices who constituted the plurality in Arnett stated with respect to due process:

". . . the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . ." Arnett, supra, page 152.

The plurality thus concluded that extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here.

In Johnson, the chancellors of the various campuses in the state university system were faced with budget cuts, and thus had to determine how to effectuate them. The plaintiff-professor was discharged by his chancellor as a result of such situation. With respect to the plaintiff's claim that the chancellor was an impartial decisionmaker, the court stated at page 240:

"The initial decision obviously had too be made by someone and the chancellor was a wholly appropriate choice." There is nothing in that case, however, to suggest a potential for bias or impartiality as in the case at bar and thus it is inopposite.

The respondents and amici curiae argue that the existence of postdetermination review procedures ameliorate any impartiality in the original determination. An analysis of the two procedures suggested, however, reveals their inadequacy. The first is the common-law writ of certiorari. The scope of review by certiorari is limited to determining:

". . . '. . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.' " State ex rel. Ball v. McPhee (1959), 6 Wis. 2d 190, 199, 94 N.W. 2d 711. See also State v. Goulette (1974), 65 Wis. 2d 207, 222 N.W. 2d 622.

The second suggested procedure — review by the Wisconsin Employment Relations Commission under sec. 111.70 (4), Stats. Such procedure applies only in the case of employee prohibited practices, however. Neither of these alternatives provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker. In light of that fact, it is difficult to see how either review by common-law certiorari or by the WERC[8] can replace an impartial decisionmaker in the first instance.

When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days

[8]But *see: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., supra.*

was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22 (2), Stats., provides in part: "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

Assuming the school board did recognize, under this factual background, that it was not an impartial decisionmaker or hearing officer as constitutionally contemplated, where was it to go to obtain an authorized impartial hearing officer or decisionmaker? The answer is that the law as it presently exists does not provide for one. Legislation could establish a necessary forum and procedures directly or by delegation to a proper department of government, but it does not.

When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution,[9] can fashion an adequate remedy.

The plaintiffs-appellants contend that part of sec. 118.22 (2), Stats., which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process. If the statute can be construed or procedures provided to meet a valid constitutional objection, it should be done.

We believe the school board should make the initial determination as to the hiring or firing of one or many teachers.

[9]Sec. 9, art. I, Wis. Constitution, states: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." *See also: State ex rel. Wickham v. Nygaard* (1915), 159 Wis. 396, 150 N. W. 513; *Wisconsin Telephone Co. v. Public Service Comm.* (1939), 232 Wis. 274, 287 N. W. 122, 287 N. W. 593; *Huebner v. State* (1967), 33 Wis. 2d 505, 147 N. W. 2d 646.

In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake — notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.

In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, obtain a de novo determination of all issues in any court of record in the county where the school district or a part of it is located. The issues shall be determined by the court without a jury, unless the judge determines to call a jury and receive an advisory verdict. The court shall resolve any factual disputes and provide for a reasonable disposition.

The trial of the contested issues shall be given a trial date preference consistent with the reasonable administration of the court's calendar.

This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body. However, because of fundamental constitutional protection is involved and no adequate forum exists, we fashion this remedy. It will be available to teachers[10] until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process.

This procedure just announced requires that we reverse the trial court's summary judgment and that the matter be remanded to the trial court with the right of the parties to

[10]This remedy is limited to public school teachers because we deal here with a specific school teacher statute, sc. 118.22 (2).

amend their pleadings so as to bring the necessary issues before the trial court.

The appellants also assert that the action of the board of education, wherein it decided to discharge the striking teachers, was in violation of the open meeting law.

This issue was raised in the appellants' third cause of action in the amended complaint filed in the trial court.

Paragraph 15 of the amended complaint provides:

"On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The open meeting law, sec. 66.77, Stats., provided in part, prior to June 15, 1974:

"(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at each closed session.

"(3) Nothing herein contained shall prevent executive or closed sessions for the purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion."

The trial court sustained a demurrer to the third cause of action of the complaint, concluding that the meeting of the board fell within exceptions (3) (a) and (b) of the statute. With respect to (3) (b), the court noted that the complaint failed to allege that any employee had requested an open meeting.

The appellants' argument centers around the failure of the board to give any notice of the meeting. They contend that exception (3) (a) does not apply because deliberations after a "judicial or quasi-judicial trial or hearing" necessarily amounts to an "adjournment of a public meeting into a closed session," and therefore requires a public announcement or notice. No authority is cited for that proposition and we believe the language of the statute permits no such interpretation.

With respect to sub. (3) (b), the appellants contend that they are foreclosed from requesting an open meeting because notice that the meeting was to be held was never given. First, it must be noted that the statute (prior to June 15, 1974) did not require that notice be given. More importantly, however, paragraph 5 of the amended complaint,

which is specifically incorporated by reference into the third cause of action, clearly states that the board "notified the employees that the Board was considering taking action against their then current teaching contracts." In light of such allegation, which is borne out by other parts of the record, the appellants' contention that they had no opportunity to request an open meeting is without foundation. We conclude the demurrer to the third cause of action was properly sustained.

By the Court. — Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed. No costs to be taxed.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

HANLEY, J. (Concurring in part; dissenting in part).

I concur with the majority's conclusion that the demurrer to the third cause of action relating to the alleged violation of the open meeting law was properly sustained.

I respectfully dissent to the majority's ruling reversing the trial court's granting of summary judgment on the first cause of action.

Sec. 111.70 (4) (l), Stats., provides as follows:

"Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

The above provision means exactly what it states. Therefore, the action of the teachers, acting in concert, in refusing to report for work cannot be sanctioned as a strike either by this court, the school district, the teachers' union or the teachers. The action of the teachers constitutes a unilateral breach of employment.

On April 2, 1974 the board held a special meeting at which it adopted a resolution terminating the employment of the teachers who refused to report for work. Such action was an acceptance of the breach of contract by the teachers. With that acceptance, all employment relations between the board and the teachers terminated. Upon that termination any action on the part of the board relative to discharge was superfluous. There is no issue to be tried.

I would affirm the judgment.

I am authorized to state that Mr. Justice CONNOR HANSEN joins in this concurrence-dissent.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

ROBERT W. HANSEN, J. (concurring). School boards in this state are directed by statute to contract for the serv-

ices of qualified teachers in their schools.[1] School teachers in this state are employees of such school boards and stand "in a contract relation."[2] Except as otherwise provided by statute,[3] or constitutionally required,[4] the entire relationship between a school board and a school teacher derives from the contract between them.[5]

[1]Sec. 118.21 (1), Stats., provided: "The school board shall contract in writing with qualified teachers. . . ."

[2]*State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 446, 206 N. W. 213, holding: "One engaged in teaching in this state and whose services are to be paid for in whole or in part by the state school fund . . . stands in a contract relation. . . ."

[3]*See: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 557, 151 N. W. 2d 617, holding sec. 111.70 (3) (a), Stats., to prohibit municipal employers, including school districts, from " '1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. 2.

" '(2) Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.' "

See also: Sec. 119.42, Stats., establishing teacher tenure or permanent appointment after three years of continuous teaching service, but applying only to cities of the first class. As to status under tenure law, *see: State ex rel. Thompson v. School Directors* (1923), 179 Wis. 284, 288, 191 N.W. 746, citing *State ex rel. Murphy v. Board of Trustees* (1918), 168 Wis. 238, 169 N. W. 567.

[4]*See: Alston v. School Board of City of Norwalk* (4th Cir. 1940), 112 Fed. 2d 992, holding that the right of a negro teacher to declaratory or injunctive relief against the practice of a school board in fixing salaries for negro teachers at a lower scale than for white teachers is not waived, or otherwise precluded, by the fact that the negro teacher has entered into a contract with the school board for the current year to perform teaching services. (Certiorari denied in 311 U.S. 693, 61 Sup. Ct. 75, 85 L. Ed. 448.)

[5]*Board of Education of South Milwaukee v. State ex rel. Reed* (1898), 100 Wis. 455, 462, 76 N. W. 351, holding: ". . . the relations and obligations between the relator . . . and the high school board of said district were purely and strictly of a contractual character. . . ."

The school board in Hortonville had entered into such contractual relationship with each of its school teacher employees for the school year, 1973-74. Each such personal service contract fixed the salary, determined the services to be performed and set the term or period of employment. Each such contract incorporated into it "the last collective bargaining agreement," the 1972-73 master contract, between the Hortonville school board and the Hortonville education association.[6] When the Hortonville teachers went on strike, they were teaching under contract, not after their contracts had expired.[7] When they failed to appear at the school to perform their duties under the contract, it became the duty of the school board to conduct an "inquiry into the question of the failure of a teacher to perform his contract obligation" and in case of such breach "to take such steps as may be necessary to carry out the purposes of the school."[8]

[6]"It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. . . ." (Individual contract, March 12, 1973.)

[7]As to "minimal procedural safeguards" of sec. 118.22, Stats., applying to teachers not rehired, *see: Richards v. Board of Education* (1973), 58 Wis. 2d 444, 458, 206 N. W. 2d 597.

[8]*Curkeet v. Joint School District* (1914), 159 Wis. 149, 152, 149 N. W. 708, this court holding: ". . . School boards have thereby [sec. 441, Stats. 1913] enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school, and if a teacher has failed to perform his duties under his contract they can discharge him from further service. . . ."

Facing such duty to ". . . take such steps as may be necessary" to reopen the school, the Hortonville school board acted. It did not go to court (as appellants now claim it should have) to seek an injunction, not only declaring the strike illegal[9] but also ordering the teachers back to the classroom under the contract. It could have chosen this route, but was not required so to elect. Neither did the school board prefer charges of misconduct against the teachers, seeking their "discharge for cause" under the contract.[10] It could have taken this approach, but it is clear that it did not bring charges of misconduct under the contract. Instead, what the Hortonville school board did was to rescind or terminate the personal service contracts as to all teachers who elected to remain on strike. (The dissenting-in-part opinion terms this ". . . an acceptance of the breach of contract by the teachers," which is another way of saying the same thing.)

The communication sent each teacher by the board stated that the board had been informed by its superintendent of schools that, "You have breached your individual employment contract; You have engaged in an unlawful

[9]*See:* Sec. 111.70 (4) (1), Stats. (upheld as constitutionally valid, applied to teachers, by majority opinion here), provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

[10]*Scott v. Joint School District* (1881), 51 Wis. 554, 557, 8 N. W. 398, this court holding: ". . . We think the school board . . . have the power to close the school and discharge the teacher for just cause. . . ." As to scope of judicial review of such discharge for just cause, *see: Clark v. Blochowiak* (1942), 241 Wis. 236, 239, 5 N. W. 2d, 772, holding, where board of vocational education discharged for cause a supervisor of its dental clinic after a hearing, that, on certiorari to review the action taken by the board, ". . . the only matter the court could properly consider was whether on the evidence properly received by the board the charges against the plaintiff were sustained."

strike contrary to Wisconsin law."[11] The communication set a time and place for hearings as to whether the individual teacher had breached the employment contract, and noted that possible board action, if the facts established such breach, included ". . . termination of your employment contract."[12] A subsequent resolution, adopted by the school board, terminated the employment relationship as to teachers who had been thus notified or who had waived notice of their ". . . alleged breach of employment contract and participation in an unlawful strike."[13] To the writer it appears clear that the school board, by thus terminating the employer and employee relationship on the ground of a major breach of such contract by the striking teachers, was rescinding the contracts of personal service as to all teachers who did not return to their teaching assignments.

A contract, including a personal service contract,[14] remains in force in accordance with its terms, unless one party to it ". . . acts inconsistently with the duty imposed upon him by the contract, which amounts to an abandonment. . . ."[15] However, it is not every breach of a contract consisting of failure to perform exactly that entitles the other party to rescission. Our court has held that, before a party not in default may be entitled to relief of rescission,

[11]Letter from Roger Weihing, President, for the Board of Education to individual teachers, March 29, 1974.

[12]*Id.*

[13]Resolution, Adopted by the Board of Education, April 2, 1974.

[14]68 Am. Jur. 2d, *Schools,* sec. 143, page 475, stating: "The principles governing contracts generally are applicable to contracts for the employment of teachers. Thus, such a contract is considered one for personal services and, where entered into for a definite term, is an entire contract for the period covered."

[15]17 Am. Jur. 2d, *Contracts,* sec. 482, page 951.

there must be "so serious a breach of the contract by the other party as to destroy the essential objects of the contract."[16] Or, as another court has phrased it, the failure of performance, in order to constitute a ground for rescission, must be total, "such as to defeat the object of the contract or render it unattainable."[17] The claim of right to terminate and rescind its contracts with its teachers on ground of breach of contract was properly assertable by the Hortonville school board. But the determination of whether the claimed breach of contract constituted ground for such rescission was here for a court to decide.

With the school board action found to be a rescission of contract, based on claim of teacher breach of contract, it follows that either party to the contract had right of recourse to the courts for a judicial determination of whether the breach warranted the rescission.[18] With the multiple cancellations of personal service contracts involved in an area of vital public concern, in the case before us the legal remedy is obviously inadequate, and the aid of a court of equity is required.[19] It follows that the school board here might have

[16]*Hoffman v. Danielson* (1947), 251 Wis. 34, 38, 27 N. W. 2d 759, this court holding: ". . . Before a party not in default may be entitled to the relief of rescission, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. . . ."

[17]*Ellison, Son & Co. v. Flat Top Grocery Co.* (1911), 69 W. Va. 380, 387, 71 S.E. 391, stating the rule to be: " 'Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable. . . .' " Quoting 24 Am. & Eng. Ency. L 644.

[18]17 Am. Jur. 2d, *Contracts*, sec. 503, page 979, stating: "Although contracts do not terminate as a matter of course on a breach, they may be terminable therefor. . . ."

[19]*See:* 17 Am. Jur. 2d, *Contracts*, sec. 485, page 955.

sought by application to a court of equity a judicial affirmation of its action in rescinding the employment contracts on ground of serious breach of contract by the teachers. Certainly the teachers, all or any one of them, are also entitled to challenge in a court of equity the action taken by the board. In either event, the issue for the court to determine is whether the breach of their contracts by the teachers under the circumstances,[20] was such as to warrant the school board's action in terminating their employment and rescinding their contracts. The test is the Hoffman Case test.[21] In the posture of this case, the teachers have instituted equity proceedings, but not for the purpose above set forth. However, with an opportunity to amend such petition or pleadings granted, the proceedings instituted can be amended to present this issue and permit a judicial determination as to whether the teacher conduct, under the circumstances, justified the school board action.

Also on appeal to this court is the challenge to an order of the county court of Outagamie county, the Honorable R. Thomas Cane, presiding, which included orders that the school board submit a list of discharged teachers whom the board "would offer positions back" for the balance of the 1973-74 school year, that the board offer striking teachers positions for the balance of the 1973-74 school ". . . if and

[20]17 Am. Jur. 2d, *Contracts*, sec. 501, page 977, stating: "No hard and fast rule exists as to the right of rescission for cause; the right usually depends on the circumstances of the particular case. . . ." *See also:* 17 Am. Jur. 2d, *Contracts*, sec. 503, page 980, stating: ". . . Moreover a party seeking to rescind must show that he was free from default in relation to the obligation which he claims the other party failed to perform. . . ." *See also:* As to violations of contract held not to justify rescission: *E. L. Ilusting Co. v. Coca Cola Co.* (1931), 205 Wis. 356, 237 N. W. 85, 238 N. W. 626.

[21]*Hoffmann v. Danielson, supra*, footnote 16.

when vacancies arose," and that striking teachers offered a vacancy for the remainder of the 1973-74 school year accept such offer. The basic issue on appeal appears to be the jurisdiction of the county court, sitting in equity, to issue the order. The board initiated the proceedings involved, seeking a court order limiting picketing activity. Without comment on the issues raised on such appeal, pro or con, the writer considers it unfortunate that such appeal (No. 133, August Term, 1974) was not consolidated with the appeal here, so that all aspects of judicial proceedings involving the Hortonville teachers' strike could have, at one time and in one opinion, been considered and determined.

On this appeal, however, applying the law to the facts, the writer would: (1) Concur in the majority holding that the no strike by county or municipal employees' statute, sec. 111.70 (4) (1), Stats., is constitutionally valid; (2) concur in the majority holding that the open meeting law was not here violated; and (3) concur in the majority holding for reversal and remand but would limit the scope and purpose of such remand, with appellants here granted leave to amend their petition within thirty days, the petition to be amended to raise and present for judicial determination the issue of whether the acts of the teachers, under these circumstances, justified the school board in rescinding the employment contracts and terminating employment.

(JUDGMENT OF WISCONSIN SUPREME COURT)

And afterwards, to-wit on the 5th day of February, A.D., 1975, the same being the 54th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Hortonville Education Association and Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond,

Appellants,

v.

Hortonville Joint School District No. 1; Board of Education of Hortonville Joint School District No. 1; Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and Marvin Obry, Robert Kohls and Gene Riedl, individually and as administrators of Hortonville Joint School District No. 1,

Respondents.

This cause came on to be heard on appeal from the judgment of the Circuit Court for Outagamie County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court for Outgamie County herein, be, and the same is hereby reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed.

Opinion by Justice Beilfuss.

(Justices Hanley and C .T. Hansen concur in part; dissent in part. Memo filed. Justice R. W. Hansen concurs. Memo filed.)

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR REHEARING

The Respondents named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., hereby move this Court for rehearing in the captioned matter. The decision herein was filed February 5, 1975.

February 21, 1975.

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JAMES K. RUHLY

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR REHEARING

The appellants by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS by Robert H. Friebert, hereby move the Court for a rehearing in the above captionel case.

Dated this 22nd day of February, 1975.

SAMSON, FRIEBERT, FINERTY & BURNS
By /s/ ROBERT H. FRIEBERT

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

PETITION FOR ORDER TO SHOW CAUSE
AND TEMPORARY RESTRAINING ORDER

The appellants by their attorney ROBERT H. FRIEBERT, hereby petition the Court for a temporary restraining order and order to show cause with respect to the above captioned case and in support of said petition represent and show to the Court as follows:

1. On February 5, 1975 this Court issued an opinion in the above captioned case holding that the respondent School Board was a constitutionally defective body to determine the facts of an alleged strike and was a constitutionally defective body for purposes of imposing a penalty, if any, upon persons ultimately found to have engaged in striking. The case was reversed and ordered remanded to the Circuit Court of Outagamie County for a de novo hearing on the merits of all aspects of this labor dispute, with the Circuit Court of Outagamie County directed to independently determine the facts and the appropriate action to be taken, if any, under all of the circumstances of the controversy.

2. This case is presently pending in the Wisconsin Supreme Court in that 20 days have not elapsed from the filing of this opinion and, therefore, this Court has sole jurisdiction in the premises.

3. Commencing on or about February 12, 1975, the respondent School Board issued notices that the Board was

considering dismissal of the individual appellants by non-renewal of teaching contracts which they may have. A copy of a sample letter of notification is attached hereto as Exhibit "A".

4. The only basis which the School Board could possibly have for attempting to now dismiss the individual appellants is their conclusion that the appellants were striking and that the penalty to be imposed for striking is dismissal. The respondents are therefore attempting to destroy the rights of the appellants by this subterfuge.

5. Hearings are scheduled to commence on Tuesday, February 25, 1975. Oral notification of the commencement of these hearings was given on February 19, 1975.

6. The respondent School Board is without jurisdiction to do anything whatsoever with respect to the allegations of striking since those issues are the subject matter of this appeal and exclusive jurisdiction in the premises is at this time in the Wisconsin Supreme Court and, upon remittitur, exclusive jurisdiction will be in the Circuit Court of Outagamie County.

7. The 1972-1973 "master contract" was extended by the Board in March of 1974. That contract compels the Board to state reasons for dismissal by non-renewal of a contract. (Page 8 of "master contract"). Furthermore, no teacher can be dismissed unless the dismissal is "for just cause". (Page 1 of "master contract", Management Rights, ¶2). A copy of the "master contract" is attached hereto as Exhibit "B".

8. Thus, your appellants are being threatened with a continuation of their loss of property and liberty without

being provided due process of law as compelled by the opinion of the Court. The action taken by the respondents, if not restrained, would interfere with the jurisdiction of this Court, cause irreparable injury to the appellants and would circumvent and destroy the decision of the Court dated February 5, 1975.

WHEREFORE, your appellants pray that this Court issue an order to show cause for a date certain compelling the respondents to show why they should not be permanently restrained and enjoined from proceeding with their proposed dismissal of the individual appellants as contained in Exhibit "A" and for a temporary restraining order until the matter is heard and decided preventing the respondents from taking any action whatsoever with respect to their proposed dismissal of the individual appellants as contained in Exhibit "A".

Dated at Milwaukee, Wisconsin this 20th day of February, 1975.

/s/ ROBERT H. FRIEBERT

[EXHIBIT A, Petition for Order to Show Cause and Temporary Restraining Order]

Whether you hold a teaching contract for the 1974-75 school year may be an issue subject to litigation.

Pursuant to Sec. 118.22, Wis. Stats., you are hereby advised that the Board of Education for the Hortonville Community Schools is considering nonrenewal of any teaching contract it may be determined you have.

Please be further advised that Sec. 118.22 (3), Stats., provides that you have the right to a private conference with

the Board prior to being given notice of refusal to renew any contract it may be determined you have. However, if you wish such a conference, you must file a request therefor with the Board within 5 days after your receipt of this preliminary notice.

FOR THE BOARD OF EDUCATION:
By /s/ Marvin Obry, Superintendent

[Exhibit B omitted, printed at page 42 of this Appendix]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the application of the appellants,

IT IS HEREBY ORDERED that the respondents show cause if any they have on the 24th day of February, 1975 at 11:00 o'clock in the forenoon as to why they should not be permanently restrained and enjoined from proceeding with their proposed dismissal of the individual appellants by non-renewal of their teaching contracts for the 1975-1976 school year as outlined in the petition of the appellants attached hereto and made a part hereof.

IT IS FURTHER ORDERED that the respondents are restrained and enjoined until further order of this Court from taking any actions whatsoever with respect to their proposed dismissal of the individual appellants by non-renewal of their teaching contracts for the 1975-1976 school

year as set forth in the petition attached hereto and made a part hereof.

IT IS FURTHER ORDERED that a copy of this order to show cause and temporary restraining order be served upon the counsel for the respondents no later than February 22, 1975.

/s/ HORACE W. WIEKI
Chief Justice, Wisconsin Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND TO DENY PERMANENT INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND IN OPPOSITION TO ORDER TO SHOW CAUSE FOR PERMANENT INJUNCTION

Respondents, by Melli, Shiels, Walker & Pease, S.C., their attorneys, hereby move the Court to vacate the Temporary Restraining Order herein and to deny Appellant's petition for a permanent injunction for the following reasons.

1. Appellants are still on strike (see Respondent's supporting affidavit, and the Appellants' petition for leave to file an original action in this court). Since such strikes are unlawful, Appellants are not entitled to injunctive relief.

Judge Deehr so held (Ap. App. 144) such holding has never been appealed, and is the law of the case.

2. Even if Appellants were to terminate their strike and make an unconditional offer to return to work, Appellants unlawful strike caused the Board to respond to its duty to operate the schools by hiring its present staff of teachers. Therefore, equity requires Appellants not be given injunctive relief against a situation caused by their unlawful strike.

3. The nonrenewal of a teacher is not the taking of property. Nonrenewal for lack of a vacancy does not deprive a person of liberty. Board of Regents v. Roth (1972) 408 U. S. 564. Richards v. Board of Education (1972) 58 Wis. 2d 444.

4. If Appellants could allege and prove that there is a property right because of the 1972-73 master contract, the Appellant's argument establishes the very point Respondents have argued:

The dimensions of the property rights are limited to and defined by the contract, both the collective and the individual contract. The collective contract and each individual contract leaves the school board the power to discharge whether or not the school board is an "adversary".

Any property right is limited by this retention of authority.

The school board must contract with teachers in writing (Wis. Stat. 118.21) and the property conferred by such contract is necessarily limited by the next section, 118.22, which retains in the employer, as in all other employment relationships, the authority to discharge.

If the school board exceeds its authority, the property, which is the contract, gives the remedy of a breach of

contract action before the WERC. The Appellants, if they are correct that the Board took away property—as defined by the contracts—may sue for breach of contract before the courts or the WERC. The suit before WERC would not need to prove discrimination for union activity. WERC has jurisdiction over breach of collective bargaining agreements. Wis. Stat. 111.70(3)(a)5.

The most property that was ever granted was limited by the authority of the board to discharge, and subject to action for breach.

Any property granted by the master contract was also conditioned on not striking. (See the master contract, page 2, Grievance Procedure Section A, attached to Appellants' petition.) Appellants did strike. Employment—i.e. property—may be and was conditioned on not striking. Postal Clerks v. Blount, 325 F.Supp. 879, affirmed 404 U.S. 802 (1971).

Even if the property right granted was not conditioned on the employers right to discharge, or the employees refraining from a strike, the contract could and did constitute an agreement that the Board could discharge whether or not it was an adversary, and therefore constituted a waiver. D. H. Overmyer Co. v. Frick Co., (1972) 405 U.S. 173.

5. Even if Appellants could allege and prove a taking of property or a deprivation of liberty, they are not irreparably harmed. Judge Deehr so held. (A. App. 145) Appellants appear to claim a right to reinstatement and backpay. That is a complete remedy.

6. The Respondent District would be irreparably harmed by an injunction. Unless it nonrenews by March 15, it will by statute, be deprived of the opportunity to even argue the clear holding of Roth and Richards that nonrenewal is

not a taking of property. Under the Court's holding, a court could decide in effect that it would have been more reasonable to give in to all the strikers' demands, despite the fact that Wis. Stat. 111.70(1)(d) does not require a school board to make a bargaining concession.

7. No bond would secure the Board against the risk that an injunction could cause present teachers to quit, leaving the Board with inadequate staff. There is no showing how many of the striking teachers wish to return. An evidentiary hearing would, we believe, show that substantial numbers of them do not wish to return since they have moved or have contracts with other districts.

8. The replacement teachers at Hortonville would be irreparably harmed by an injunction. They are not parties to this action, nor is there any reason to nonrenew them, except the perhaps constitutionally impermissible reason that they did not violate the anti-strike ban. If the School Board is enjoined so that it cannot even argue that it could nonrenew, the Board might have to attempt to nonrenew the present teachers to reduce its liability.

9. Appellant's petition is not properly brought before the Supreme Court. There is no provision for such a motion. Appellants in effect are attempting to start an original action in Supreme Court.

10. The Court's decision states the Board's action in discharging was not improper, and indeed the Board was required to make a decision on what to do. The decision gives Appellants a right to ask a court to decide if another course would have been more reasonable. Until that right has been exercised, successfully, there is no basis for inferring wrongdoing in the Board's conduct.

The Order issued is effective until further order of the Court. Conferences are scheduled for February 25, 1975. We request the Order be vacated, and no injunction issued.

Respectfully submitted,

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JACK D. WALKER
/s/ JAMES K. RUHLY

DATED: February 24, 1975

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE TEMPORARY RESTRAINING ORDER, AND OPPOSING MOTION FOR PERMANENT INJUNCTION

STATE OF WISCONSIN

ss.

COUNTY OF DANE

Jack D. Walker, being first duly sworn, states as follows:

1. He is one of the attorneys for the Respondents in the captioned case, and he makes this affidavit in support of the Respondents' motion to vacate the Temporary Restraining Order herein which was served February 22, 1975, and in opposition to Appellants' motion for permanent injunction. Affiant makes this affidavit because respondents and members of respondent board of education are unable to be in Madison this date due to weather conditions. This

affidavit is made on information and belief and upon documents in affiant's possession.

2. Members of the class of Appellants in this case and the Hortonville Education Association have regularly through at least Thursday, February 20, 1975, picketed the Hortonville schools, bearing picket signs stating they are on strike.

3. Neither members of the class of Appellants herein nor the Hortonville Education Association has terminated the strike nor made an unconditional offer to return to work, to the date of this affidavit.

4. The 1972-1973 master contract was not extended by the Board in March of 1974. Such contract in any event did not require nonrenewal be limited to just cause.

5. Respondent did give a notice of the reason for nonrenewal, e. g. ". . . there is presently no vacancy available." Such reason complies with the 1972-73 master contract, even if such agreement were applicable.

6. Approximately 57 of the persons to whom notices of consideration of nonrenewal were sent requested a conference with the Board. Approximately 24 responded and stated they did not want a private conference with the Board "since the Board is in an adversary position to me." Copies of a sample of each response are attached hereto and marked Exhibits "A" and "B" respectively. Three persons have not responded to the date of this affidavit.

7. Respondent Board of Education has a complete staff of teachers working who are competent; and the Board has no reason to nonrenew such persons.

8. Hortonville Education Association by its counsel has stated to the Wisconsin Employment Relations Commission in support of a motion to dismiss a petition for union election filed by a rival labor organization that "84 discharged employees may ask the court to decide for each of their cases the propriety of the strike and whether the Board's conduct in discharging them was warranted."

9. Respondents do not threaten Appellants with a loss of liberty or property.

Dated February 24, 1975.

/s/ JACK D. WALKER

[Subscription omitted in printing]

[EXHIBIT A, WALKER AFFIDAVIT]

Rt. 2
Whitewater, Wisc.
Feb. 14, 1975

Mr. Robert Hauk, Clerk

Board of Education
Hortonville Joint School District No. 1
111 East Cedar Street
Hortonville, WI 54944

Dear Mr. Hauk:

Pursuant to the provisions of Section 118.22 of the Wisconsin Statutes, I request a private conference with the Board of Education regarding the proposed nonrenewal of my teaching contract. You are further advised that I will be represented by the Hortonville Education Association

and its affiliates with respect to the proposed nonrenewal and at the private conference. By accepting a conference I do not waive my rights to a court hearing.

Very truly yours,

/s/ JERRY J. ADDIE

[EXHIBIT B, WALKER AFFIDAVIT]

1014 Shiocton Street
New London, Wisconsin
February 15, 1975

Mr. Robert Hauk, Clerk

Board of Education
Hortonville Joint School District No. 1
111 East Cedar Street
Hortonville, WI 54944

Dear Mr. Hauk:

This letter will acknowledge receipt of your letter advising me that the Board is considering the non-renewal of my contract. Please be advised that I do not desire a private conference with the board since the board is in an adversary position to me. Further I desire that all of my rights to employment and back pay to be adjudicated in the court proceedings which will begin shortly. My rejection of a conference is not to be construed in any way as a waiver of my entitlement to my job, to back pay or any other constitutional rights.

Very truly yours,

/s/ PATRICIA WEBER

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN
Madison, February 24, 1975

To: ROBERT H. FRIEBERT
Attorney at Law
Suite 440, 710 N. Plankinton Avenue
Milwaukee, WI 53203
MR. JACK D. WALKER
Attorney at Law
309 Insurance Building
Madison, WI 53703

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSOCIATION et al v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al, No. 635

The order to show cause dated February 22, 1975, herein having come on for hearing on February 24, 1975, together with the respondents' motion to "vacate temporary restraining order and to deny permanent injunction" and case No. 635 still being pending in this Court, the decision and mandate in the case having been entered on February 5, 1975, and a motion for rehearing having been filed by respondents on February 24, 1975,

IT IS ORDERED that the order to show cause for temporary restraining order is denied.

IT IS FURTHER ORDERED that the temporary restraining order as entered on February 22, 1975, is vacated and

IT IS FURTHER ORDERED THAT this order is entered with the proviso that any determination by the respondent school board to not extend a teaching contract to the appellants herein for the school year of 1975-1976 is without prejudice to the rights of any party in case No. 635, the determination of whose rights must abide the hearing to be held by the circuit court in accordance with the mandate of this Court in case No. 635.

Respectfully yours,
/s/ ROBERT O. UEHLING
Clerk of Supreme Court.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

PER CURIAM (on motions for rehearing). The last sentence on page 482, continuing on page 483 of 66 Wis. 2d 469 is revised as follows:

> "Whether the master contract between the board and the Hortonville Education Association and the contracts between the individual school teachers and the board are comparable to contracts involved in other cases where striking teachers were disciplined or discharged cannot be determined from the record in this case."

Motions for rehearing are denied without costs.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION OF RESPONDENTS FOR STAY TO PERMIT APPLICATION TO SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT OF MOTION

TO: THE HONORABLE JUSTICES OF THE WISCONSIN SUPREME COURT:

Respondents respectfully present this, their application for an order staying enforcement of the decision of this Court rendered February 5, 1975, rehearing of which was denied March 28, 1975, for a reasonable time under the provisions of section 2101(f) of Title 28 of the United States Code, to enable petitioner to apply for and obtain a write of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

1. Respondents believe this Court's decision decided adversely to Respondents federal questions of substance not heretofore determined by the Supreme Court of the United States.

2. To the extent this Court decided adversely to Respondents federal questions of substance heretofore determined by the Supreme Court of the United States, Respondents believe this Court decided such questions in a way probably

not in accord with applicable decisions of the United States Supreme Court.

3. After this Court denied Respondents' motion for rehearing, the Supreme Court of Michigan on April 4, 1975 decided a school board could terminate striking teachers consistent with due process. A copy of the Michigan Supreme Court decision in Board of Education of the School District of Crestwood v. Crestwood Education Association is attached. A district court in Michigan and the New Hampshire Supreme Court have resolved the Constitutional question different from this Court's decision. Federation of Teachers v. Lake Michigan Community College (W.D. Mich., 1974) .. F. Supp. . .., 88 L.R.R.M. 2873; Farrelly v. Timberlane Regional School District (N.H. Sup Ct., 1974) 324 A.2d 723.

4. Appellants in this captioned case commenced a civil action in the United States District Court for the Eastern District of Wisconsin on April 1, 1975, Case No. 75-C-175 in which they seek to litigate the question whether federal due process requires an order of immediate reinstatement of striking teachers prior to the trial which this Court orders. The complaint in said civil action alleges this court has decided that the action taken to date by the Hortonville School Board was adjudicated by this Court to have violated Appellants' federal due process rights. A copy of the complaint in 75-C-175 is attached.

The reason why a stay is deemed necessary is that the de novo review mandated by this Court's decision would be unnecessary and would involve unwarranted time and expense for both parties if the United States Supreme Court should grant the writ of certiorari and reverse.

Dated April 16, 1975.

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JAMES K. RUHLY

[Board of Education of the School District of Crestwood v. Crestwood Education Association and copy of Complaint in U.S. District Court, E.D. of Wis., Case No. 75-C-175, omitted in printing]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No. 635

[Caption omitted in printing]

APPELLANTS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' REQUEST FOR A STAY

FACTS

On February 5, 1975, this Court rendered a decision in the above captioned case reversing the trial court's determination. The Court held that the appellants had been denied due process of law when the Hortonville Board of Education, a party to an underlying dispute resulting in termination of the appellants' employment by the board, acted as the decisionmaker to impose punishment in a situation where due process of law was required. The decision went on to order that the Circuit Court sit as the decisionmaker with respect to determining whether the appellants did in fact engage in an unlawul strike and, if so, to determine what penalty, if any, is appropriate.

Motions for rehearing, raising different issues, were filed by both parties and were denied on March 28, 1975. After the teachers' motion for rehearing was denied, an action

under the Civil Rights Act was filed in Federal Court asking for reinstatement until such time as a determination is made by the independent decisionmaker. The teachers have not, however, repudiated either this Court's decision that the appellants were entitled to and were denied due process or the utilization of the Circuit Court as an independent decisionmaker to decide the appropriate penalty, if any.

The respondents have now indicated to the Court that they intend to petition the United States Supreme Court for a Writ of Certiorari and have asked this Court to stay its mandate. The request, if granted, would effectively allow the deprivation of due process that the appellants have now suffered for over a year to continue even longer. Therefore, the appellants ask the Court to consider this memorandum in opposition to the respondents' request.

ARGUMENT

A. The Federal Questions Decided by this Court are not Novel.

The first reason posed by the respondents for granting a stay is that the issue decided adversely to the respondents is a federal question of substance "not heretofore determined by the Supreme Court of the United States." While it is true that the Supreme Court apparently has not decided a case on exactly the same facts as this, it is inaccurate to suggest that the issues involved are novel. The Wisconsin Supreme Court decided that under Wisconsin law the appellants had a property interest in continued employment, that an allegation made against them that they had violated state law threatened their liberty, and that these considerations of Wisconsin law gave rise to a due process requirement. The

Court then recognized that one of the elements of due process is an independent decisionmaker. The Court was not deciding a federal question of substance "not heretofore determined by the Supreme Court of the United States" in that this Court relied entirely on United States Supreme Court decisions to support that proposition.

> "The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. See Gibson v. Berryhill (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L. Ed. 2d 488; Ward v. Village of Monroeville (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L. Ed 2d 267; Morrissey v. Brewer (1972), 408 U.S. 471, 485, 92 Sup. Ct. 2593, 33 L. Ed. 2d 484; Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L. Ed. 2d 287." Hortonville Education Association v. Hortonville Joint School District No. 1, 66 Wis. 2d 469, 491-492 (1975).

The Court then went on to find that because of Wisconsin's statutory duties imposed upon the board, the board was engaged in the collective bargaining process with the appellants and, therefore, the board members were "not uninvolved in the events which precipitated decisions they were required to make." Thus, because of the specific facts involved, the Court held that the board was not an impartial decisionmaker.

B. This Court's Decision is Clearly in Accord with Applicable Decisions of the United States Supreme Court.

The respondents do not cite any cases in support of their argument that this Court's decision is inconsistent with

any applicable decisions of the United States Supreme Court. Presumably, however, they are once again referring to Arnett v. Kennedy, 416 U.S. 134 (1974). Reference to the previous briefs filed in this case, particularly the briefs in support of and in opposition to the parties' motions for rehearing will show that this Court's decision is completely in accord with decisions of the United States Supreme Court defining property and liberty interests, the requirement of an independent decisionmaker, and the factual circumstances which render a decisionmaker partial.

Arnett, the only case from the United States Supreme Court which the respondents have relied on in this respect, is clearly inapposite as this Court has already concluded. 66 Wis. 2d at 495.

That this Court was correct in rejecting Arnett in this case is clear from subsequent decisions by the United States Supreme Court which have refused to consider Arnett in areas not arising under the Federal Civil Service law, the Lloyd-LaFollette Act, as was demonstrated to the Court in the Appellants' Brief in Response to Respondents' Motion for Rehearing at pages 8-11.

C. The State Court Cases Cited by the Respondents do not Support the Propositions Asserted.

The Michigan Supreme Court decisions of April 4, 1975, Board of Education of the School District of Crestwood v. Crestwood Education Association, . . Mich 2d . . (1975), supplied by the respondents, actually supports the accuracy of this Court's decision. The minority in that case, of course, agreed substantially with this Court and cited this Court's decision in support of their position. Page 12 of minority

opinion. The majority, despite the respondents' suggestions, largely agreed with this Court's opinion as well.

The majority opinion from the Michigan court agreed with this Court that engaging in a strike, even if unlawful, is not an abandonment of either the employment or the property interest involved. Page 8. That Court also accepted, at least arguendo, that a teacher's statutory rights under Michigan's Teacher Tenure Act constitute property. Page 7. That Court also found fault with a school board being a decisionmaker with respect to strike allegations.

> "Since the hearing will ordinarily be conducted by the employer, as the officer or body having general disciplinary authority, a Section 6 hearing is not an appropriate forum for the employee to assert in defense the employer's violation of the Act."
> Page 11.

The effective result of the majority opinion in Michigan is similar to this Court's opinion. The Michigan majority simply held that a school board could discharge teachers for striking without a hearing since a hearing was required shortly thereafter under existing Michigan law.

The Wisconsin Supreme Court, while holding that the school board was an improper decisionmaker, allowed the school board to make the initial decision and created a procedure for de novo review. This Court held that the school board was not a proper decisionmaker where property rights or liberty interests are involved and the school board is in an adversary position. That issue was not presented to the Michigan court. However, as noted above, in passing, the Michigan court agreed with that proposition. The practical result of both decisions is nearly the same. Because of

the remedy that this Court has provided, the respondent school board is also allowed to make the initial determination and the discharged employee has the burden to seek review. The Michigan case, while decided on a different basis, has the same result.

The respondents' continued reliance on Farrelly v. Timberlane School District, 324 A. 2d 723 (1974) is once again misplaced. As pointed out in the Appellants' Brief in Response to Respondents' Motion for Rehearing, at Page 13, the facts in Farrelly are nearly the opposite of the facts in this case.

D. The Effect of Withrow v. Larkin.

On April 16, 1975, the United States Supreme Court rendered its decision in Withrow v. Larkin. A copy of that decision is appended hereto. The respondents, by letter dated April 17, 1975, have suggested to the Court that that decision would justify not only a stay but reconsideration, although it appears from the letter that the respondents have not seen the decision. An examination of the opinion demonstrates beyond any reasonable question the accuracy of this Court's decision on the merits of the due process claim.

Larkin v. Withrow, 368 F. Supp. 796 (Ed.D. Wis. 1973) was a decision by a three judge District Court on a motion for a preliminary injunction which restained the Wisconsin Medical Examining Board from engaging in limited adjudicative functions with respect to charges it had also investigated. The United States Supreme Court reversed the decision of the three judge court upon a carefully limited conclusion that the combination of investigative and adjudicative functions does not, without more, automatically

constitute a due process violation as creating an unconstitutional risk of bias.

The three judge court decision was cited to this Court by the appellants in support of the proposition that one is entitled to an impartial decisionmaker when due process is required. This Court did not cite the lower court opinion in Larkin as support for its ruling. Even if it had, however, the United States Supreme Court's reversal would have had no adverse effect on this Court's decision.

As noted above, the ruling of the United States Supreme Court was on a narrow fact issue, that is, mixing of investigative and adjudicative functions by a body that is not involved in the underlying dispute giving rise to the threatened deprivation of property or liberty interests. In reaching its conclusion, the United States Supreme Court discussed due process rights in general and the right to an independent decisionmaker in particular in great detail. An examination of those discussions leads to the virtually undeniable conclusion that this Court was correct in its rulings on the merits of the appellants' claim.

In determining that there was no due process violation with respect to the mixing of functions involved in Larkin, the United States Supreme Court talked about situations which do present problems. The Court said:

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' Murchison, supra,

cf. Tumey v. Ohio, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." Pages 10-11. (Footnotes omitted) (Emphasis supplied).

That paragraph not only reaffirms cases cited to and relied on by this Court, it also summarizes the situation involved in this case. The fair trial in a fair tribunal principle is applicable to administrative agencies, like school boards. A biased decisionmaker is unconstitutionally acceptable. Actual bias need not be shown, as long as a probability of unfairness is apparent. One situation in which that probability of unfairness is apparent is where the adjudicator has been party to a bitter dispute from which the charges of misconduct arise.

Larkin stands for the proposition that if an investigator has no relationship to the conduct for which punishment is sought, but acts as an adjudicator after having acted as an investigator, the probability of actual bias on his part is not inferrable unless something else is shown. It clearly recognizes, however, that if the adjudicator has other contacts, particularly with the conduct for which the penalty is sought to be imposed, a probability of actual bias disqualifying that person as a decisionmaker exists.[1]

[1]The Supreme Court was careful to note that actual bias need not be demonstrated. A "probability of actual bias" suffices. p. 11.

One of the cases cited in support of the general proposition stated by the United States Supreme Court on Pages 10 to 11 was Pickering v. Board of Education, 391 U.S. 563 (1968). The Court referred particularly to footnote (2) on Pages 578-579, from the appendix of the Court. In that footnote the following statement is made:

> "In the present case the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal."

In Pickering, the Supreme Court declined to rule on the independent ground that the procedure described denied due process for lack of an impartial decisionmaker because the issue was raised for the first time in the Supreme Court. But the Court went on to say:

> "On the other hand, we do not propose to blind ourselves to the obvious defects in the fact finding process occasioned by the board's multiple functioning vis a vis appellant."

On Page 17 of Larkin, the United States Supreme Court also pointed out that Pickering was a different situation from that presented in Larkin. The Court distinguished Larkin from Pickering, on the ground that Pickering, unlike Larkin, involved a trier of fact that was the same body involved in the underlying dispute with the party sought to be penalized. Pickering, like Hortonville, involved a dispute between a teacher and the school board.[2]

[2]*Larkin* also demonstrates the correctness of this Court's decision with respect to the nonapplicability of *Arnett*. The statutory scheme of the medical examining board's operations would, presumably, support an *Arnett* argument at least to as great an extent as the school operations

On Page 11 of the Larkin opinion, the United States Supreme Court mentions that one approach in determining "probability of actual bias" is by undertaking "a realistic appraisal of psychological tendencies and human weakness . . ." The Wisconsin Supreme Court correctly analyzed the great temptation facing the board to expeditiously resolve their bitter labor dispute by firing the teachers, Realistically, it is too much to expect the board to be fair in imposing punishment upon those who they consider to be their tormentors.

The fact that the board was the combatant of the teachers also undercuts the critical distinction made at Page 17 of the Larkin decision. The United States Supreme Court distinguished In re Murchison, 349 U.S. 133 (1955) as follows:

> "Appelee relies heavily on In re Murchison, supra, in which a state judge, empowered under state law to sit as a 'one-man jury' and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, passing on guilt or innocence, he very likely relied on 'his own personal knowledge and impression of what had occurred in the grand jury room,' an impression that 'could not be tested by adequate cross-examination."

statutes, if it were applicable. That it is not even mentioned by a unanimous Supreme Court dealing directly with the impartial decision-maker question is a clear indication that it is limited to cases arising under the federal civil service laws.

Obviously, the school board had been adversaries of the teachers for many months; they presumably believed in the righteousness of all of their positions; they had engaged in countless secret meetings and conversations; and they had discussed strategy upon strategy for dealing with their dispute. The members of the board, just like the "one-man grand jury" of Murchison, were adversaries of the teachers, had their own "knowledge and impression" of the facts developed from their own experiences and these beliefs and impressions "could not be tested by adequate cross-examination."

CONCLUSION

The appellants strongly oppose any stay in this case. While they agree with this Court on the merits of the constitutional claim, the appellants believe that they have still been denied a remedy in that the now declared constitutional deprivations which they have suffered in the past will continue to exist until a hearing before an impartial decision-maker. A stay would prolong the constitution deprivation even more.

The reasons given for the requested stay are totally insufficient. This Court's decision was completely consistent with existing law from the United States Supreme Court. If there had ever been any doubt about that it was clearly laid to rest with the recent decision of Withrow v. Larkin. Indeed, the Court's careful distinction in Larkin between situations like that presented in Larkin and those present in Pickering and the case before this Court, strongly supports this Court's February 5, 1975 ruling. The Larkin case suggests that either certiorari will be denied or, if granted, that the decision of this Court will be affirmed. Under such circumstances,

particularly in light of its effect, a stay would be highly inappropriate.

Respectfully submitted,

ROBERT H. FRIEBERT
THOMAS W. ST. JOHN

[Copy of United States Supreme Court decision in Withrow v. Larkin omitted in printing]

CORRECTED ORDER
Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 30, 1975

To: MR. JAMES K. RUHLY

Attorney at Law
Melli, Shiels, Walker & Pease
119 Monona Avenue
Madison, WI 53703

MR. ROBERT H. FRIEBERT
Attorney at Law
Samson, Friebert, Finerty & Burns
710 No. Plankinton Avenue
Milwaukee, WI 53203

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSOCIATION et al v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al, No. 635.

The motion of respondents for an order to stay enforcement of the decision of this Court rendered February 5, 1975, for a reasonable period of time, having been considered by the Court,

IT IS ORDERED that the motion of the respondents for stay of the enforcement of the decision of this court rendered February 5, 1975, for a reasonable period of time is hereby granted.

IT IS FURTHER GRANTED that the enforcement of this decision is stayed for a period of ninety (90) days from the date of this order or until the further order of this court.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR RECONSIDERATION OF STAY ORDER

On April 30, 1975, the Court granted the respondents' motion for a stay of enforcement of the decision of the Court rendered February 5, 1975. The Court granted the respondents a stay of ninety (90) days. The appellants request that the Court reconsider that decision, or, in the alternative, modify it so as to limit the stay period to no more than fifteen (15) days.

The effect of the Court's order, if not modified, will be to continue the now recognized deprivation of the appellants'

rights to such an extent that they may effectively be precluded from any meaningful decision by the impartial decisionmaker. The respondents had ninety days from the date of this Court's denial of their motion for rehearing in which to petition the United States Supreme Court for certiorari. By granting them a ninety day stay from April 30, 1975, this Court is inadvertently encouraging the respondents to delay their petition until the last possible moment and still have approximately thirty days of grace period before being required to answer the appellants' charges. If the respondents take advantage of the full ninety day period available to them for filing their petition, it is likely that the matter will not be considered by the United States Supreme Court until after the beginning of the next term in October, 1975. Thus, the deprivation of rights that has existed since April of 1974 will be allowed to continue well into the third school year affected.

This Court has already ruled that the appellants were denied their rights to due process of law. The appellants believe that the only way such a deprivation can be remedied is through their reinstatement until such time as due process is afforded. While the Court has not ordered reinstatement, it has recognized the constitutional infringement. The stay granted, however, clearly conflicts with the Court's ruling. The appellants request, therefore, that the Court reconsider its order of April 30, 1975, and deny the respondents' request for a stay. The appellants also renew their request for an order of reinstatement pending a hearing comporting with the principles of due process.

In the alternative, if the Court feels that a stay is appropriate, the appellants respectfully request that the stay be limited to a period of no more than fifteen (15) days. Because of the issues involved in this case, any action taken by the Court with respect to a stay should be designed to encourage, rather than discourage, a speedy application to the United States Supreme Court. Since the respondents have already had more than a month to prepare their petition, and since the issues to be raised therein have already been thoroughly briefed and discussed in this Court, there is no justification for a delay. That is particularly true in view of the nature of the case. If the respondents are to be given any stay at all, it should be only enough to allow them to prepare and file their petition as quickly as possible. Any stay beyond that time should be sought from the United States Supreme Court on the strength of the petition submitted.

Respectfully submitted,

ROBERT H. FRIEBERT
THOMAS W. ST. JOHN
Attorneys for Appellants

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, May 7, 1975

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSN. et al v. HORTONVILLE JOINT SCHOOL DIST. NO. 1 et al, #635.

The motion of appellants for reconsideration of stay order rendered February 5, 1975, [SIC] or, in the alternative, to

modify it so as to limit the stay period to no more than fifteen (15) days, having been considered by the Court,

IT IS ORDERED that the motion be, and the same is hereby denied.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

The appellants by their attorneys, SAMSON, FRIEBERT, FINERTY & BURNS by ROBERT H. FRIEBERT, hereby move the Court for the entry of an order vacating the stay order previously entered in this case for the following reasons:

1. To date, the respondents have failed to serve and file any petition for certiorari in an effort to obtain review by the United States Supreme Court thereby demonstrating that they do not intend to pursue this matter in a speedy manner; and

2. An appropriate bond as required by 28 U.S.C. §2101(f) has not been filed. The appellants suggest that an appropriate bond in this case is $3,000,000 which represents the approximate value of salaries plus fringe benefits for which the respondents might be liable.

Dated at Milwaukee, Wisconsin this 7th day of June, 1975.

SAMSON, FRIEBERT,
FINERTY & BURNS
By Robert H. Friebert

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MEMORANDUM OPPOSING MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

The Respondents, by their attorneys Melli, Shiels, Walker & Pease, S.C. by Jack D. Walker, hereby oppose Appellant's motion to vacate stay order, dated June 7, 1975, for the reasons stated herein.

1. Respondents' petition for certiorari has been printed and probably will be served and filed on the date this memorandum is filed.

2. Appellants asserted in their motion that 28 U.S.C. §2101(f) requires a bond. Actually the section states a stay "may be conditioned on the giving of security . . . ." (emphasis supplied).

3. Appellants did not raise any bond question either at the time the order was entered (April 30) or when they moved for "reconsideration" of the order (May 7, 1975). In respect of a bond, therefore, Appellants have waived the argument, and the question ought not be considered now because of Rule 251.70 which states motions respecting final determinations will not be considered after 20 days.

4. Wis. Stat. 274.26 states no bond is required of a school district to perfect an "appeal"; the statute states the appellate court may require security as a condition to further prosecution of the appeal. In this case the appellate court is now the U.S. Supreme Court.

5. No bond is needed because the school district is a government which will be neither more nor less responsible with a bond than without a bond.

6. Appellants present no facts to support the assertion a $3,000,000.00 bond, or any bond, is needed. Appellants still have not terminated their strike. There now is another determination by a court that Appellants did strike. See Michael Wisnoski, et al. v. Roger Weihing, et al., Docket No. 75-C-175 (E.D. Wis., June 4, 1975), a copy of which is attached hereto, at page 2.

7. The issue involved in the Hortonville case is of increasingly widespread importance to the conduct of municipal governments and administrative agencies. An example of developments since this Court's decision is the decision of Judge John G. Buchen in Naus v. Joint School District No. 1 of the City of Sheboygan Falls, et al., a copy of which is attached. In the Naus case the county court applied the Hortonville rationale to a nonrenewal, without a discussion whether the board and the teacher were adversaries.

Dated this 16th day of June, 1975.

MELLI, SHIELS, WALKER,
& PEASE, S.C.
By: Jack D. Walker

[Wisnoski v. Weihing, Docket No. 75-C-175 (E.D. Wis., June 4, 1975) and Naus v. Joint School District No. 1 of the City of Sheboygan Falls, et al., omitted in printing]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No. 635

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

THOMAS W. ST. JOHN, being first duly sworn, on oath, deposes and states to the Court as follows:

1. That affiant is an attorney at law, duly licensed to practice law in the State of Wisconsin, and is one of the attorneys for the appellants above named.

2. That on the 17th day of June, 1975, along with Attorney ROBERT H. FRIEBERT, the affiant prepared a document entitled "Reply Brief in Support of Motion to Vacate Order Staying Execution of Judgment" in which, on pages 1-2 the statement was made that the respondents' delayed filing of their petition to the United States Supreme Court "appears to be a deliberate effort to prevent consideration during this term of the United States Supreme Court and to force consideration in the October, 1975 term of the United States Supreme Court."

3. That according to the official notice served upon Attorney ROBERT H. FRIEBERT by Attorney JACK D. WALKER, one of the attorneys for the respondents, the

petition for a writ of certiorari was docketed in the Supreme Court of the United States on June 19, 1975.

4. That pursuant to Rule 24, revised Rules of the Supreme Court, the petition is not distributed by the Clerk to the members of the United States Supreme Court for consideration until 30 days have expired from the filing of the petition unless there is an express waiver of the right to file a brief in opposition or such a brief is actually filed in a shorter time.

5. That the United States Supreme Court is now in its summer recess and will be so recessed until the beginning of the October, 1975 annual term commencing on the first Monday in October, 1975.

6. That according to information supplied to the affiant by Mr. PAUL JONES, Assistant Clerk, United States Supreme Court, no action will be taken on the petition for certiorari prior to reconvening of the Court for the October, 1975 term.

7. That this affidavit is made in support of the appellants' motion to vacate order staying execution of judgment.

Dated this 3rd day of July, 1975.

THOMAS W. ST. JOHN

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, July 8, 1975

Sir:—The Court today announced decision in your case as follows:

#635 Hortonville Education Assn. et al. v. Hortonville Joint School Dist. No. 1, et al.

The motion of appellants to vacate the stay order of this court dated April 30, 1975, having been considered by the court,

IT IS ORDERED that the motion is denied without costs. (467 F4)

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION OF RESPONDENT FOR CONTINUANCE OF THE STAY PREVIOUSLY GRANTED TO ALLOW APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT OF MOTION

To: The Honorable Justices of the Wisconsin Supreme Court

Respondents respectfully petition this Court for an order continuing the stay of this Court's decision until such time as the United States Supreme Court acts on the petitions for certiorari now pending before it.

On April 30, 1975 this Court ordered:

"IT IS FURTHER GRANTED that enforcement of this decision is stayed for a period of ninety days from

the date of this order or until further order of this court."

The above order is requested because, consistent with respondents' original application for a stay of the decision and acting under that stay, respondents have filed a Petition for a Writ of Certiorari with the United States Supreme Court seeking review of aspects of this Court's decision which resolved federal questions of substance adversely to respondent. Said petition was filed with the United States Supreme Court on June 19, 1975.

On June 26, 1975 appellants filed a petition for certiorari, entitled "Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court of Wisconsin." Therein appellants request review of: (1) this Court's failure to order their immediate reinstatement with backpay, contending that the absence of such relief denies due process of law; and (2) this Court's failure to hold that Wisconsin's prohibition of public employee strikes denies equal protection of the law. The appellants' petition is stated to be conditional and requests review of the above described aspects of this Court's decision in the event that respondents' petition is granted. Respondents' brief in response to appellants' petition is due on July 28, 1975.

The reason why a continuation of the stay is deemed necessary is that the repleading and trial mandated by this Court's decision would be unnecessary and require the unwarranted expenditure of time and money by the parties as well as the trial court if the United States Supreme Court should grant either writ of certiorari and reverse or modify this Court's decision. This Court granted the stay in order to allow the filing of a petition for certiorari. Petitions have

been filed. Respondents have requested that the record be forwarded to the United States Supreme Court. The stay should be extended consistent with its original purpose.

Dated: July 22, 1975.

MELLI, SHIELS,
WALKER & PEASE, S.C.
By: /s/ JACK D. WALKER

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

APPELLANTS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR CONTINUANCE OF STAY

On July 22, 1975, the respondents moved the Court for an Order continuing the stay of this Court's mandate until such time as the United States Supreme Court acts on their petition for certiorari. The appellants oppose the requested extension.

The Court entertained the appeal in this matter on an expedited basis because of the urgency of the matters presented. The decision of the Court requiring due process hearings for the appellants was rendered in February, 1975. Because of the stay previously issued, however, the appellants have had no effective remedy.

During the course of previous proceedings with respect to the respondents' request for a stay, the appellants advised the Court that the timetable being utilized by the respon-

dents was such as to preclude any meaningful review of the respondents' petition by the United States Supreme Court until the October, 1975 Term. The appellants warned the Court that the respondents would simply continue petitioning the Court for an extension of the stay on the grounds that the United States Supreme Court would not be able to consider their petition until the October Term. However, the appellants also pointed out that if the respondents had acted diligently that problem would not exist. Thus, while the present Motion before the Court was totally predictable, the reasons for the requested extension are largely the product of the respondents' own making.

This Court has given the respondents more consideration than their position justifies. The appellants request, therefore, that the Court either vacate the stay or allow the stay to end as a matter of course. The respondents will then be able to seek a stay, as they should have in the first instance, from the United States Supreme Court on the strength of their petition. Since a stay is originally directed to the Circuit Justice, there is no need for the Court to be in session in order for the respondents to make their application and have it considered.

Alternatively, if the Court decides to continue the stay, the appellants request that such continuation be conditioned on the filing of a bond by the respondents sufficient to cover another year of potential lost wages to the appellants.

Dated this 29th day of July, 1975, at Milwaukee, Wisconsin.

Respectfully submitted,

FRIEBERT & FINERTY
By: /s/ THOMAS W. ST. JOHN
Attorney for Appellants

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, August 1, 1975

Sir:—The Court today announced decision in your case as follows:

#635 Hortonville Education Assn. et al. v. Hortonville Joint School Dist. et al.

The motion of the appellants for an extension of the stay of proceedings ordered by this court on April 30, 1975, having been considered by the court, and the court having determined that the purpose of the stay order has been accomplished, in that the appellants have been permitted sufficient time to apply to the United States Supreme Court for a writ of certiorari and have so applied,

IT IS ORDERED that the motion is denied. No costs taxed.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEY-

ER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

APPLICATION FOR STAY OF MANDATE OF THE WISCONSIN SUPREME COURT PENDING REVIEW ON CERTIORARI

TO: The Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit

Petitioners, the Hortonville Joint School District No. 1, pray for an order staying the mandate of the Wisconsin Supreme Court pending final determination of the matter by this Court. In support of this application, petitioners respectfully show as follows:

A. Statement of the Case. Petitioners are a Wisconsin school district, the school board, its elected members and its agents. Under the laws of the State of Wisconsin, petitioners operate a public school system charged with serving the educational needs of a rural community of 8,500 persons. On March 18, 1974, the teaching employees of the school district went on strike. The superintendent twice advised each teacher that the strike was illegal under the laws of Wisconsin and invited the teacher to return to work. The teachers continued their strike. The superintendent informed the school board of the strike. The board scheduled hearings and notified the individual teachers of the hearings and their purpose. After hearing, at which the individual teachers were represented by counsel, the board terminated the striking teachers and hired replacements. On April 4, 1974, respondents, the Hortonville Education Association, a labor union affiliated with the largest statewide teacher's labor union and the National Education Association, commenced this action alleging that the discharges were unlawful under state law and the due process clause of the Federal Constitution and prayed for an order preventing the board from reopening the schools by hiring replacement teachers. The trial court denied a request for temporary relief and thereafter granted petitioners' motion for summary judgment, holding that the discharges were authorized under state law and that respondents were not denied due process of law.

On appeal respondents argued that the procedure followed by the school board in terminating them denied due process in only one respect, i.e., "the lack of an impartial decisionmaker." The Wisconsin Supreme Court, after resolving all state law issues in favor of petitioners, and specifically relying on a statement in Morrissey v. Brewer, 408 U.S. 471 (1972), held that the elected school board was prohibited by the federal Constitution from discharging the illegally striking teachers because "the board was not an impartial decisionmaker in a constitutional sense." The Wisconsin Supreme Court expressly found no actual or personal bias on the part of the members of the school board. Thus,

though: (1) state law vested the decision to discharge exclusively in the elected school board; (2) the teachers admitted to being on strike in violation of state law; and (3) the schools were closed by the strike, the Wisconsin Supreme Court decided that Morrissey compelled a holding that procedural due process under the Fourteenth Amendment required the displacement of the employer (the school board) as decisionmaker because the board also had collective bargaining responsibilities. Recognizing, however, that the application of Morrissey to resolve the process due in this situation produced an untenable result, the Court's remedy was to create a new cause of action to be brought in a state trial court and at which the respondents could attempt to show that a "more reasonable" course of action was open to the school board.

Petitioners seek review of the Wisconsin Supreme Court's holding on the procedural due process issue in No. 74-1606. The remedy fashioned by the state court is the subject of respondents' Conditional Cross Petition for Certiorari, No. 74-1638. That petition also seeks review of an equal protection claim, first raised before the State Supreme Court, but decided adversely to respondents on the merits.

B. Reasons for Granting the Writ. The Petition raises at least two major questions warranting review by this Court:

(1) The decision below seriously misconstrues this Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972) and Arnett v. Kennedy, 416 U.S. 139 (1974), as construed by this Court in Withrow v. Larkin, 43 U.S.L.W. 4459-67 (April 16, 1975), decided after the decision below.

Morrissey does not suggest that procedural due process prohibits an elected school board, charged by state law with

providing universal education and accountable to taxpayers and parents of school children, from making a policy decision permitted by state law because it also has the responsibility for collectively bargaining. See, Withrow v. Larkin, supra. As noted in the Brief in Opposition to the Conditional Cross Petition of respondents (No. 74-1638), the remedy fashioned by the Wisconsin Supreme Court itself reveals the inapplicability of Morrissey to this case.

(2) Decisions by the highest courts of other states and the Circuit Court of Appeals for the District of Columbia hold, in conflict with the decision below, that a public employer does not violate due process by terminating illegally striking employees. (See cases cited at pages 11-12 of the Petition for Certiorari.) The decision below is also in direct conflict with Federation of Teachers v. Community College, (Civil Nos. 74-2323 and 74-2324, 6th Cir. July 2, 1975), unofficially reported at 89 LRRM 2865, decided after the decision of the Wisconsin Supreme Court.

C. Jurisdiction. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. 1257(3). Jurisdiction to issue a stay rests upon 28 U.S.C. §2101(f).

The decision below is final within the meaning of 28 U.S.C. §1257. The remaining litigation is a newly created proceeding on separate and independent issues. No federal questions remain. It is the substitution of the trial court for the school board as decisionmaker that is sought to be reviewed. Further, the constitutional issue may not be preserved if the ordered proceeding takes place. If the petitioning school board is successful, a case or controversy may no

longer exist, yet the board has still been ousted as the arbiter of policy in the district. The decision below is final and ripe for review by this Court because the remaining litigation is independent of the federal question and completely unnecessary if review is granted and the decision below reversed. North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973); Organization For a Better Austin v. Keefe, 405 U.S. 415, 418 (1971); Harris v. Washington, 404 U.S. 55, 56 (1971); Mills v. Alabama, 384 U.S. 214 (1966); Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964); Local No. 438 v. Curry, 371 U.S. 542 (1963); Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963).

D. Prior Stay Proceedings. On April 16, 1975 petitioners moved the Wisconsin Supreme Court for a stay pursuant to 28 U.S.C. §2101(f). The motion requested a reasonable time to apply for and obtain a writ of certiorari from this court. (Exhibit A, attached) On April 30, 1975 the state Supreme Court ordered that petitioners motion for a stay for a reasonable period of time be granted. (Exhibit B, attached) That order further stayed enforcement for a "period of ninety days or until further order of the court."

Thereafter respondents moved the Wisconsin Supreme Court for an order vacating the stay granted April 30 or, in the alternative, limiting the period of the stay to fifteen days. On May 7, 1975 the Wisconsin Supreme Court denied that motion. (Exhibit C, attached) On June 4, 1975 the District Court for the Eastern District of Wisconsin dismissed an action brought by respondents against petitioners on the grounds that it was an attempt to have that federal court review the judgment of the Wisconsin Supreme Court. Three

days later respondents again moved the Wisconsin Supreme Court to vacate its stay order and, for the first time, urged that a bond be posted. (Exhibit D, attached) Both parties filed briefs and on July 8, 1975, the Wisconsin Supreme Court denied the motion to vacate the stay and the request for a bond. (Exhibit E, attached)

On June 19, 1975 petitioners filed their Petition for a Writ of Certiorari and on June 26, 1975 respondents filed a conditional cross-petition for certiorari requesting review of an equal protection issue and the remedy created below.

On July 22, 1975 petitioners moved the Wisconsin Supreme Court for an order extending the stay which was to expire on July 30, 1975, until this Court acted on the respective petitions. On August 1, 1975 the Wisconsin Supreme Court denied petitioners' motion for an extension of the stay on the grounds "that the purpose of the stay order has been accomplished, in that the appellants have been permitted sufficient time to apply to the United States Supreme Court for a writ of certiorari and have so applied." (Exhibit F, attached)

E. Reasons for Extending the Stay. The stay should be extended to avoid irreparable harm and to correct a misconception of 28 U.S.C. §2101(f) by the Court below.

(1) The Wisconsin Supreme Court, after argument, granted petitioners' request under 28 U.S.C. §2101(f) for a reasonable time to apply for and obtain a write of certiorari. That court, not petitioners, selected ninety days. Thereafter respondents twice sought to vacate or shorten the stay on the grounds that the ninety day period might or would prevent this Court from acting on the stay until the October term 1975. The Wisconsin court rejected those arguments

and refused to require a bond. Those orders reflect the state court's evaluation of the equities involved and is entitled to deference. By twice refusing to limit the stay, it was determined that petitioners' interest in review by this Court without simultaneously having to proceed with a newly fashioned remedy overbalanced respondents' interest in beginning a lengthy and possibly unnecessary proceeding.

The declination to continue the stay reflects a misreading of 28 U.S.C. §2101(f). The order declining to extend the stay cites as its only grounds that the purpose of the stay has been accomplished because the petition has been filed. That is not the purpose of a stay granted under 28 U.S.C. 2101(f). That section authorizes stays for a reasonable time to obtain a writ. Petitioners moved for a stay under §2101(f) and that motion was granted on April 30, 1975.

Alternatively, the Wisconsin Supreme Court's action in not extending the stay can be interpreted only as a decision that it was without jurisdiction to continue the stay because the petitions had been filed. Again, 28 U.S.C. §2101(f) empowers the Wisconsin Supreme Court to continue the stay until the matters before this Court are finally resolved.

Any other construction of the action below is inconsistent with the granting of the original stay. No changed circumstances have been alleged other than that the petitions have been filed with this Court. Objections to the duration of the stay were raised below by the respondent union and rejected by the Wisconsin Court.

(2) Failure to continue the stay visits irreparable harm on the petitioner and the public it represents yet does not harm respondents. A stay prevents commencement of the lengthy proceeding determined below to be constitutionally

necessary. That proceeding is unnecessary if either petitioners or respondents have their petitions granted and this Court reverses.

Petitioners' interests in continuing the stay is the avoidance of the expenditure of sizable amounts of public money in unnecessary litigation and the avoidance of the confusion, uncertainty and administrative interference that would result from an unnecesary proceeding commenced at the start of the school year. These expenditures would not be recoverable.

Respondents are not harmed by continuance of the stay for approximately eight weeks. They have publicly claimed entitlement to backpay and therefore suffer no irreparable harm. Further, under Wisconsin practice rules it is not possible for a trial court to reach a decision before school opens in late August.

WHEREFORE, petitioners pray that the judgment and mandate of the Wisconsin Supreme Court, previously stayed pending a final determination of the matter by this Court.

Respectfully submitted,

Jack D. Walker
MELLI, SHIELS, WALKER & PEASE, S.C.
Counsel for Petitioners
119 Monona Avenue
Madison, Wisconsin 53703

DATE: August 8, 1975

Exhibits atttached to application printed in the Appendix as follows:

Exhibit A at page ——— 285-87
Exhibit B at page ——— 298-99
Exhibit C at page ——— 301-02
Exhibit D at page ——— 302
Exhibit E at page ——— 306-07
Exhibit F at page ——— 311

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1606

[Caption omitted in printing]

OPPOSITION TO PETITIONERS' APPLICATION FOR STAY OF MANDATE OF THE WISCONSIN SUPREME COURT PENDING REVIEW ON CERTIORARI

TO: The Honorable William H. Rehnquist
Associate Justice of the Supreme Court
of the United States and Circuit Justice
for the Seventh Circuit

The petitioners have filed an application for a stay of the mandate of the Wisconsin Supreme Court on the strength of their petition for a writ of certiorari to the Wisconsin Supreme Court previously filed. The Respondents oppose the application.

I.

STATEMENT OF CASE

The statement of the case presented by the petitioners in the application is both incomplete and misleading. A more complete and accurate statement can be found by examining the conditional cross-petition for writ of certiorari to the Supreme Court of the State of Wisconsin, October Term, 1974, No. 74-1638, which was filed by the respondents in this case. The conclusions of the Wisconsin Supreme Court which are being challenged by the petitioners are more accurately explained in the brief for respondents in opposition which was previously filed in this case.

The essential facts necessary to resolve the present application for a stay are not complicated. In the spring of 1974 the teachers attempted to engage the school board in meaningful collective bargaining not only for the 1974-75 school year but for the year that was coming to an end as well. The teachers felt that they had demonstrated their good faith by working nearly the entire year then ending even though they had yet to reach agreement for that year, something which would ordinarily have been done at the end of the previous year. Concluding that the failure to reach agreement was due to a lack of good faith bargaining by the employers and that the employers were attempting to destroy their union, the teachers engaged in a work stoppage.

The school board's response was to pay deference to formalities and order precipitous and meaningless disciplinary hearings which had the inevitable result of terminating the teachers' employment. The teachers initiated suit in the Circuit Court claiming, among other things, a denial of due process of law with respect to the nature and procedures utilized for the hearings and the obvious partiality of the decisionmaker, which happened to be the board of education, their adversary in the underlying dispute.

The Circuit Court held, among other things, that applicable Wisconsin statutes gave the teachers an expectation of continued public employment rising to a level of a property

right and that charges of striking in violation of Wisconsin's public employee strike prohibition were such serious accusations in Wisconsin as to threaten the teachers' liberty interests. Although finding that the teachers were therefore entitled to due process protections, the Circuit Court concluded that since there was little dispute as to the fact of the strike, there could be little objection to the propriety of the discharges, regardless of any other shortcomings. Thus, the Circuit Court granted summary judgment in favor of the school board.

While many issues were raised on appeal to the Wisconsin Supreme Court, the one relied on by the petitioners for purposes of this application was decided in the teachers' favor. The Wisconsin Supreme Court agreed with the Circuit Court that due process was required. It parted company with the Circuit Court from that point on, because it recognized that discharge is not an automatic penalty for striking in Wisconsin but rather that the discipline to be imposed upon public employee strikers, if any, depends on the underlying circumstances of the case. The court went on to find that local circumstances caused by applicable Wisconsin law, which placed one party to a dispute in the position of being the other party's judge for charges resulting from that same underlying dispute constituted a denial of a neutral and unbiased decisionmaker and therefore denied due process of law. The Wisconsin Supreme Court held that the situation created under state law allowed the school board to conclude the bargaining process on its own terms by exercising the expedient power to discharge the teachers who were their adversaries in the negotiating process. The possession of such a weapon by one of the parties to an underlying dispute was said to create such a real risk of

partiality when that party sat as a decisionmaker with respect to the other party's conduct as to violate fundamental principles of fairness.

The court did not make a final decision on the merits of the real issue involved between the parties presently before this court, that is the appropriateness of any penalty to be imposed under the circumstances. What it did was to vacate the summary judgment entered by the Circuit Court and remand the matter to the trial court for hearings of a de novo nature in which the trial court was to decide the penalty, if any, which could properly be imposed against the teachers under the circumstances. The court also set up a similar procedure for the future in cases arising under like circumstances.

The decision of the Wisconsin Supreme Court was rendered in February of 1975. It is now August of 1975 and the de novo hearings designed to satisfy due process have yet to be held. The Wisconsin Supreme Court stayed its mandate at the request of the petitioners for the purpose of allowing the petitioners to seek a writ of certiorari from this court. The petitioners delayed their applicaton to such an extent that it became impossible for this court to consider the merits of the petition prior to reconvening for the October, 1975 Term. Had the petitioners acted diligently, there would be no need for the stay now being sought from this court. The pattern suggests a deliberate attempt to utilize this court's summer recess to delay resolution of the merits of this case to such an extent that the teachers will necessarily be precluded from returning to work for another year. It is against that background that the respondents oppose the present petition for a further stay. Alternatively, if a stay is to be granted, the respondents ask that it be conditioned

upon the filing of adequate security to provide compensation for the respondents sufficient to cover another year of lost employment. The amount involved for the teachers each year is in the neighborhood of one million dollars.

II.

REASONS FOR DENYING THE APPLICATION

A consideration of the factors involved in this case, as well as the standards for consideration of stay applications dictates that the application in this case should be denied.

A. The Action of the Court Below.

As noted in the petitioners' application, the Wisconsin Supreme Court has already given the petitioners ample time to seek a writ of certiorari. The petitioners, had they been diligent, could have filed their petition in sufficient time so as to possibly receive consideration prior to this court's summer recess. The issues in the case had been fully briefed at two levels within the state system and it was not a major undertaking to prepare the petition for certiorari. The Wisconsin Supreme Court, having given the petitioners ninety days in which to secure review allowed the stay order to terminate this month. Due respect should therefore be given to the action of the Wisconsin Supreme Court. Magnum Company v. Coty, 262 U.S. 159, 164 (1923).

B. Enforcement of the Mandate Below Will Neither Moot the Issues Nor Cause Irreparable Harm.

The mandate of the Wisconsin Supreme Court does not resolve the issues between the parties. All it does is direct that the teachers have a fair hearing in order to determine

the appropriateness of any penalty to be imposed upon them for engaging a strike. Allowing the remand order of the Wisconsin Supreme Court to be operative simply allows the de novo hearings ordered in February, 1975 to begin. Another stay, at this point, would certainly cause irreparable harm to the teachers, the successful parties in the Wisconsin Supreme Court, in that they would be required to wait even longer to begin the due process hearings to which they were entitled in April of 1974. The balance of equities in this case clearly favors denial of the application. United States v. United Liquors Corporation, 77 S. Ct. 208, L.Ed. 2d 32 (1956).

C. The issues Presented by the Petitioners do not Stand a Reasonable Chance of Being Reviewed.

A prime consideration in determining whether to grant a stay is an assessment of the likelihood that a sufficient number of justices will vote to consider the case on certiorari. Such a result is highly unlikely in this case. As noted in the brief in opposition, jurisdiction, which is said to exist under 28 U.S.C. §1257(3), is absent. What is sought to be appealed here is an interlocutory order which does nothing more than vacate a summary judgment and remand the issues involved to the trial court. Since there is no final judgment or decree, this court lacks jurisdiction. Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, 344 U.S. 178, 180-81 (1952).

D. No Novel Question is Presented by this Case.

The Wisconsin Supreme Court found that the teachers had property and liberty interests arising by virtue of state

law and, therefore, that due process was required. That finding was clearly in accord with applicable decisions of this court. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); and Goldberg v. Kelly, 397 U.S. 254 (1970). The court also found that one of the elements due process requires is an independent decisionmaker. That was not a novel decision either. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); and Tumey v. Ohio, 273 U.S. 510 (1927). Finally, the Wisconsin court made a finding based on its unique insights into local laws and local realities that the special facts and circumstances present in the case made the risk of unfairness, considering the school board's multiple functioning, intolerably high. Withrow v. Larkin, 417 U.S. 943, 43 U.S.L.W. 4459 at 4466 (1974).

E. The Mandate of the Wisconsin Supreme Court has no Drastic Impact.

As previously noted, the mandate of the Wisconsin Supreme Court does nothing more than direct that a determination of the penalty to be imposed against the teachers, if any, as a result of their conduct be made by a fair arbitor. Neither party has won or lost the underlying issues at this stage and by no stretch of the imagination is the decision of the Wisconsin Supreme Court of such a nature that its effect must be stayed pending review. International Boxing Club v. United States, 78 S. Ct. 4, 2 L.Ed. 2d 15 (1957).

III.

CONCLUSION

On the basis of the foregoing factors, the respondents respectfully request the court to deny the petitioners' application for stay. Alternatively, if the stay is to be granted,

it is requested that it be conditioned upon the giving of adequate security pursuant to 28 U.S.C. §2101(f) and Rule 18 of the Revised Rules of the Supreme Court. The amount of security requested under such circumstances is two million dollars, which represents the approximate salary and benefit loss to the teachers should the stay effectively allow the petitioners to keep the teachers out of work for a second year.

Respectfully submitted,

Robert H. Friebert
Thomas W. St. John
FRIEBERT & FINERTY
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorneys for Respondents

SUPREME COURT OF THE UNITED STATES

No. A-133 (74-1606)

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al.,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION et al.

ON APPLICATION FOR STAY

[August 18, 1975]

Mr. Justice Rehnquist, Circuit Justice.

If the judgment of the Supreme Court of Wisconsin were plainly a "final judgment" for purposes of 28 U.S.C. §1257,

and if it plainly rested solely upon a construction of the Fourteenth Amendment to the United States Constitution, I would be inclined to grant the stay requested by the applicant School Board. I think that none of our cases require the conclusion, reached by the Wisconsin court, that a school board may not be allowed to dismiss teachers which it employs because it is not the sort of impartial decisionmaker required by due process of law. If this matter were before me on the petition for certiorari where I would be casting my vote as a Member of the Court, I would conclude that the judgment of the Supreme Court of Wisconsin did rest solely upon the Fourteenth Amendment. But in my capacity as Circuit Justice, where I act "as a surrogate for the entire Court," Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., in chambers), doubts as to whether the judgment may not rest also upon a construction of the Wisconsin Constitution, and as to the finality of the judgment, lead me to deny the application.

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

HORTONVILLE EDUCATION ASSOCIATION, et al,
Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al,

Defendants.

ORDER STAYING PROCEEDINGS

Upon the motion of the defendants, by MELLI, SHIELS, WALKER & PEASE, S.C., their attorneys, and with the

consent of the plaintiffs, by their attorneys, FRIEBERT & FINERTY,

IT IS ORDERED:

That all proceedings with respect to the first cause of action of the first amended complaint in the above captioned case and all proceedings pursuant to the mandate of the Wisconsin Supreme Court directing a de novo determination be and hereby are stayed until such time as the United States Supreme Court has rendered a decision in Case No. 74-1606, October Term, 1974, Hortonville Joint School District No. 1, et al v. Hortonville Education Association, et al, which is before the Court on a writ of certiorari to the Supreme Court of the State of Wisconsin, and Case No. 74-1638, October Term, 1974, Hortonville Education Association, et al v. Hortonville Joint School District No. 1, et al, should the conditional cross petition for a writ of certiorari to the Supreme Court of the State of Wisconsin be granted in that case.

IT IS FURTHER ORDERED:

That the consent of the plantiffs to the stay requested by the defendants shall not be construed in any further proceedings in this Court as a waiver of claims for damages, if any, accruing during the period of the stay, shall not operate to toll the running of any damages incurred by the plaintiffs or otherwise be considered as limiting said damages, shall not in any manner be considered as a factor in determining what relief, if any, is due the plaintiffs, nor as tolling any duty to mitigate any damages claimed, and shall not in any other manner be considered as affecting the merits of this action.

Dated this 22nd day of October, 1975.

/s/ ALLAN J. DEEHR
Circuit Judge